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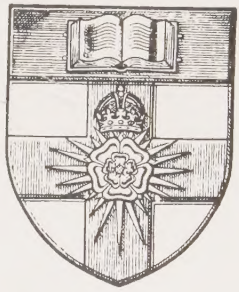

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THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

JANUARY 17, 1927, TO MAY 14, 1928.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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CORRIGENDA.

Page 131, line 18, *omit* "on the usual undertakings."
Page 176, line 2, for 1857, *read* 1851.
Page 178, for s. 1 (3) (b), *read* 1 (1) b.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER AND MR. JUSTICE TALBOT.

LEOPOLD NASH.

1927
17 *January.*

An allegation of being a habitual criminal ought to be tried.

Appeal from order refusing leave to appeal against conviction and sentence.

Applicant was convicted on November 29th, 1926, at the Leeds Assizes, of larceny in a dwelling-house, and was sentenced by McCardie J. to seven years' penal servitude. An allegation that he was a habitual criminal was not tried.

The Court thought that this course was unfortunate. Every such allegation ought to be tried though, on conviction, the Court might not think fit to impose preventive detention. Otherwise it might be thought that the primary sentence was unnecessarily severe—though this could not be supposed here, in view of applicant's previous record.

Application dismissed.

H. J.

FRED DORRINGTON.

24 *January.*

On an indictment under s. 13 (1) *of the Debtors Act,* 1869 (32 & 33 *Vict. c.* 62), *there must be a direction on the intent to defraud.*

Appellant was convicted on December 9th, 1926, at the Manchester City Sessions, of obtaining credit by false pretences, and

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24 *January.*

FRED DORRINGTON.

Hewart L.C.J.
Salter J.
Talbot J.

was sentenced by the Deputy-Recorder to twelve months' imprisonment with hard labour. He appealed against conviction.

Chorley for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present, was not called upon.

Macbeth for the Crown.

The LORD CHIEF JUSTICE: There were four counts in the indictment under s. 13 (1) of the Debtors Act, 1869: the first alleged obtaining credit by false pretences, the second obtaining goods by fraud other than false pretences, and the third and fourth obtaining credit by false pretences. Appellant was convicted on counts one and three, and acquitted on the others. The verdict was "Guilty of obtaining goods by false pretences." The Deputy-Recorder suggested that this meant "Guilty of obtaining credit, &c.," and the jury, "Yes, but not by fraud." In any case there was misdirection, for the Deputy-Recorder told the jury that the three necessary elements of guilt were (1) obtaining credit, (2) a false statement, (3) credit obtained through that statement. When counsel for the Crown intervened to suggest (4) an intent to defraud as essential, the Deputy-Recorder agreed. He never made it clear to the jury that in either case there must be fraud proved. The evidence was not strong, and perhaps the jury meant to negative fraud altogether.

Conviction quashed.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE TALBOT.

HENRY SOLOMON JOSEPH COLE.

1927
31 *January.*

Illegal order quashed.

Applicant (who was not present) was sentenced to two years' imprisonment with hard labour at the Oxfordshire Sessions, on January 4th, 1927, for sending a letter threatening to murder his wife.

The Court, in refusing leave to appeal, quashed an order of Quarter Sessions giving his wife a note for ten shillings found in his possession, as that Court had no jurisdiction to make it.

Application dismissed.

Order of Quarter Sessions quashed.

H. J.

ARTHUR BENJAMIN CECIL CARVER.

Charges which can be made in separate counts of one indictment ought not to be preferred in several indictments.

Application for leave to appeal against sentence.

Applicant was sentenced on January 4th, 1927, at the East Kent Sessions, to three consecutive terms of six months' imprisonment with hard labour for larceny (three indictments).

The Court, in dismissing the application, pointed out that in

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Hewart L.C.J.
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Talbot J.

this case there was no need whatever for more than one indictment with three counts, as the three charges were not only similar, but the same. The procedure adopted was a sheer waste of money.

Application refused.

H. J.

ROBERT HUGHES.

S. 5 (1) of 5 & 6 Geo. V. c. 90, the Indictments Act, 1915, deals with "defective" indictments only, a "bad" indictment is not within it.

Appeal against conviction and sentence by leave of the Court.

Appellant was convicted, after a three days' trial at the Swansea Assizes, of obtaining money by false pretences and larceny by a trick, and was sentenced on December 1st, 1926, by Wright J., to three years' penal servitude.

T. W. Langman for the appellant, who was present.

The Earl of Halsbury, K.C., and *Ivor Brace* for the Crown.

AVORY J. called attention to the course taken at the trial with regard to the amendment of the indictment, which contained eighteen counts.

Langman said he had objected when at the close of the case for the Crown, there being no evidence either of any false statement about an existing fact or of larceny by a trick, the learned judge permitted the counts which alleged that defendant "would appoint" as managers, &c. persons who deposited certain sums with him to be altered to "could," or "was in a position to make such appointments," thus adopting the evidence given by the Crown. He had argued that the indictment was not "defective," but bad, and that the proposed amendment was not a matter of form but substance. The learned judge allowed the amendment on the ground that evidence had been directed to the false pretence in the form in which it ought to have been laid.

S. 5 (1) of the Indictments Act, 1915, runs: "Where before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the

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31 *January.*

ROBERT HUGHES.

Hewart L.C.J.
Avory J.
Talbot J.

amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice . . ." Clearly, in this case, they could "not be made without injustice."

The defence was not directed to meet the amended indictment, and there was no satisfactory evidence to support it in that form. The counts charging larceny by a trick were alternative. There was no evidence to support them, and the finding of the jury on these counts was inconsistent with that in the false pretences count.

[He was stopped.]

Lord Halsbury. There was no injustice, because the whole trial proceeded on the evidence that defendant promised that he could find places for his clients, and counsel for the defence had cross-examined all the witnesses on that basis. Moreover, if the amendment had not been made, he would have proceeded with the counts for larceny by a trick, and the jury were entitled to find obtaining by false pretences in those counts if the evidence called supported that offence. 6 & 7 Geo. 5, c. 50, s. 44 (3), Larceny Act, 1916.

He cited *Alexander Fraser*, 93 L. J. K. B. 236; 130 L. T. 320; 27 Cox, C. C. 579; 87 J. P. 208; 68 S. J. 389; 40 T. L. R. 81; 17 Cr. App. R. 182: 1923. This Court even approved of amendment by the insertion of the words "with intent to defraud" in a case of false pretences.

[The LORD CHIEF JUSTICE: But the Court there added, "There was no injustice, and it would have been a failure of duty on the part of the Court if the amendment had not been made."]

The LORD CHIEF JUSTICE (*a*): This appellant, Robert Hughes, was convicted at the Glamorganshire Assizes of obtaining money by false pretences, and of larceny by a trick, and was sentenced to three years' penal servitude. He now appeals against both conviction and sentence.

(*a*) This judgment is printed from a transcript supplied by the courtesy of the Director of Public Prosecutions.

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31 *January.*

ROBERT HUGHES.

Hewart L.C.J.

The case for the prosecution was that at the material time the appellant had fallen into financial difficulties, that by means of advertisements in newspapers he got into communication with persons who desired to be employed as managers of public-houses, and that by representing to them that he would appoint them to those positions, or obtain positions of that kind for them, he obtained from them various sums of money by way of deposit, at a time when he was quite unable to obtain those positions for them in the public-houses that were mentioned, or at all.

The indictment is before the Court. It consists of eighteen counts, and the scheme of the indictment is, with reference to the whole series of cases, to charge what was done in one count as larceny by a trick, and in another count as the obtaining of money by false pretences. Those counts were, of course, alternative counts; but the jury, having heard the evidence, convicted the appellant on all the counts in the indictment, which, of course, was absurd.

The grounds of the appeal are numerous, but it is sufficient for the present purpose, I think, to refer to three of them. The appellant alleges that the counts in the indictment relating to false pretences disclose no offence in law; that the learned judge was wrong in allowing all the counts for false pretences to be amended on the close of the case for the prosecution by the substitution of another alleged false pretence for that stated in the indictment; and, moreover—says the appellant—"I was seriously prejudiced by having to answer charges containing a different false pretence from that contained in the counts of the indictment before it was amended."

Those passages in the statement of the grounds of appeal refer to this fact, that in the indictment—I do not say as it was drawn, but as it was with great carelessness copied and passed—in every one of the counts relating to false pretences the false pretence was stated in the following terms: "By falsely pretending that he, the said Robert Hughes, would appoint the said so-and-so as manager," &c. "By falsely pretending that he would appoint." In other words, the alleged false pretence as it appeared in the indictment was a statement entirely consistent with mere futurity —"If you will give me this money, I promise you that I will do so-and-so."

The evidence was given, and nobody can read these short-

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hand notes without observing that a great part of the evidence in chief of the witnesses was directed to that kind of representation. A great part of the evidence of the witnesses, in other words, was consistent with the view that what had been said to them, and what they were saying had been said to them, was of the nature of a promise to be fulfilled in the future, as distinguished from a representation of an alleged existing fact, as, for example: "I am now in a position to appoint you," &c.

It is quite true that in some of the instances the learned judge put the question pointedly to the witnesses: "Did you understand that to mean that he was in a position to do so-and-so"? and they said "Yes."

The matter having proceeded to the end of the case for the prosecution upon the footing of the false pretences as stated in the indictment, namely, "By falsely pretending that he would appoint," &c., an application for amendment was made, and at that stage of the case the learned judge thought it right to amend every one of those counts relating to false pretences by re-stating each of them in this way: "By falsely pretending that he, the said Robert Hughes, was in a position to appoint"—in other words, clearly substituting a representation of an alleged existing fact for words which in themselves were consistent with the making or the offering of a mere promise about the future.

The appellant complains that that amendment ought not to have been made, that he protested against it, and that he is now entitled by reason of it to ask for the quashing of this conviction.

Our attention has been directed to the provisions of s. 5 of the Indictments Act, 1915. By the first sub-section it is provided as follows: "Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice."

It is contended that an amendment of that kind can be made only before the grand jury have performed their task. A contention to that effect undoubtedly was made to this Court in the case of *Alexander Fraser*, reported in 17 Cr. App. R. page 182, where the Court directed attention to the further provision contained in sub-s. (2) of s. 5 of the Act, namely: "Where an

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indictment is so amended, a note of the order for amendment shall be indorsed on the indictment, and the indictment shall be treated for the purposes of the trial, and for the purposes of all proceedings in connection therewith, as having been found by the grand jury in the amended form." That sub-section makes it abundantly clear that those words, "at any stage of the trial," are sufficiently wide to permit amendment at a time when it is no longer possible for the grand jury in fact to find the indictment in the amended form. But regard must be had to the remaining words of sub-s. (1) of this section, "unless, having regard to the merits of the case, the required amendments cannot be made without injustice."

In the opinion of the Court, that sub-section is dealing with what it speaks of, namely, a case where an indictment is defective. The function of the sub-section is to enable the Court, in order that justice may be done, to remedy a defect in the indictment. That is a wholly different matter from revising and altering the substance of what is charged. As this indictment was copied and passed, it alleged a false pretence which was no false pretence at all. The evidence that was given was largely consistent with the view that a representation of that kind, and not of another kind, was made; and in our opinion it would be a bad precedent, in the circumstances of such a case as this, to permit the re-writing of the false pretence at the conclusion of the case for the prosecution, so as to introduce into the indictment for the first time the fundamental ingredient of a representation of an alleged existing fact. It was not correcting a defect in the indictment, it was altering its substance; and it was altering its substance in circumstances in which, as it appears to us, the defendant was prejudiced by the alteration.

In those circumstances we have come to the conclusion that the verdict of guilty on all the counts of this indictment that have to do with false pretences fails, and to that extent the convictions must be quashed.

But it is said that every one of these matters appeared alternatively in the form of a charge of larceny by a trick. That is quite true, but we are no less satisfied that there was no evidence here upon which the appellant could be found guilty of larceny by a trick. There was no evidence here which gives rise to the all-important distinction between the case of a person who is

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31 *January.*

ROBERT HUGHES.

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parting with the mere temporary possession of certain property, and the case of a person who is parting with property. These men paid over their money, and intended to part with that money, relying no doubt upon hopes which in the result were disappointed.

It has further been argued that if this indictment had contained not a word about false pretences, but had merely alleged larceny, nevertheless, under s. 44, sub-s. (3) of the Larceny Act, 1916, the jury might have found that the appellant was guilty of obtaining money by false pretences. That sub-section provides that: "If on the trial of any indictment for stealing it is proved that the defendant took any chattel, money, or valuable security in question in any such manner as would amount in law to obtaining it by false pretences with intent to defraud, the jury may acquit the defendant of stealing and find him guilty of obtaining the chattel, money, or valuable security by false pretences, and thereupon he shall be liable to be punished accordingly."

Such is the clear provision of the Larceny Act, 1916, and in a proper case, and after a proper direction, no doubt the jury may return such a verdict. But that is a wholly different thing from the case of a verdict which finds false pretences upon an indictment for false pretences, that indictment being up to the last moment in substance wrong.

What might have happened if another course had been taken it is not useful to speculate, and indeed it may well be that upon the moral merits of this case there is little to be said on the part of the appellant. But we are satisfied that it would be a dangerous precedent if this amendment, being what it is, and made when it was, should be upheld. We have therefore come, not without reluctance, to the conclusion that this appeal succeeds, and that this conviction must be quashed.

Conviction quashed.

The Court ordered appellant, on entering into his own recognizance (in £200) to appear at Cardiff on February 10th to answer another indictment, to be released on bail.

Solicitor for Appellant—*B. W. P. Morgan,* Cardiff.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SALTER.

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HERBERT LAVENDER.

On the charge of being a habitual criminal, it is not a conclusive defence that the accused has done honest work since his last release; it is for the jury on all the facts, including the most recent offence proved against him, to say whether he was, at the time of its commission, "leading persistently a dishonest or criminal life."

Application for leave to appeal against conviction as a habitual criminal.

Applicant pleaded guilty to charges of burglary, shopbreaking, and being found in possession of housebreaking implements by night, at the County of London Sessions on January 12th, 1927, and was found to be a habitual criminal. He was sentenced by the Deputy-Chairman to three years' penal servitude and five years' preventive detention.

Applicant in person.

Byrne for the Crown was not called upon.

The LORD CHIEF JUSTICE, after dealing with applicant's previous convictions, referred to a few short intervals in which the applicant had done some honest work, and added: Applicant and others seem to be under the impression that proof of having done some honest work during a career otherwise criminal is sufficient to meet the allegation of being a habitual criminal. This Court has frequently denied this proposition, and notably in *J. Keane and D. Watson*, 8 Cr. App. R. 13, 14: 1912, W. N. 205, where Channell J. said: "There was evidence that in the interval each of 'the appellants' had done a certain amount of honest work . . .

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and in some cases no doubt such evidence has been held to show that the prisoner was not a habitual criminal within the Prevention of Crime Act. But it has often been pointed out in this Court . . . that the mere fact that the prisoner has done some honest work since his last release is by no means conclusive proof that he is not a habitual criminal. The point is whether, at the time when he commits the offence then being dealt with, he is leading persistently a dishonest or criminal life.' The verb is in the present tense. If he has done some honest work, but has given it up and committed another crime, it may well be that he has returned to a life of crime, and is then a habitual criminal, and the nature of the most recent crime may itself be evidence that at the time he commits it he is persistently leading a dishonest and criminal life." In this case the learned Deputy-Chairman had invited the jury to take the most lenient view they could.

Application dismissed.

H. J.

JAMES EDWIN HODSON.

Mitigation of sentence in view of a long interval free from conviction.

Appeal against sentence of five years' penal servitude passed by the Recorder at Blackburn Borough Sessions, on January 7th, 1927, for larceny.

Appellant in person.

The LORD CHIEF JUSTICE: This man's record is certainly very bad, and includes two terms of penal servitude in 1903 and 1910, and many shorter terms of imprisonment. But for eight years from 1915 no convictions are recorded against him, and since 1919 there are some intervals in which he is known to have got an honest living. The present conviction (which deals with three other admitted thefts of the same kind) is for stealing clothes from a stall in Blackburn market, of which the value in all was five or six pounds. In these circumstances, and especially the eight years' interval (which may be regarded as a new start,

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the Court is disposed to give him "another chance." But it is assuredly the last time such leniency will be shown him. The sentence is reduced to one of twelve months' imprisonment with hard labour.

Sentenced reduced.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SWIFT.

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The questions whether a house is used for unlawful gaming within s. 4 *of* 17 & 18 *Vict. c.* 38, *the Gaming Houses Act*, 1854, *and whether a game is unlawful within s.* 3 *of* 16 & 17 *Vict. c.* 119, *the Betting Act*, 1853, *are for the judge and not the jury.*

Davies, 1897, 2 *Q. B.* 199, *and* Peers *v.* Caldwell, 1916, 1 *K. B.* 371, *followed.*

Appeals on certificate.

The appellants were convicted on November 27th, 1926, the first and the last of using a gaming and betting house, and the second of keeping the same, at the Birmingham City Sessions, and were all bound over by the Recorder. They were not in custody.

The facts were not in dispute, and this was a "test" case. It was admitted that the appellants were highly respectable persons. They were interested in various ways in the proceeds of two "Pickwick Automatic Electric Amusement Machines," by the manipulation of which, after a halfpenny was put in a slot, a slight electric shock would always be secured by turning a handle, and from which, if the operator was skilful or fortunate enough in catching a ball as it fell through irregular rows of pins, a disc would issue which was accepted in Parker's shop, where the machine stood, as payment according to the value, which ranged from one penny to one shilling, stamped on its face. It was

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contended that there was an element of skill in the deft use of the mechanism. During the observation of the police no person was seen to use the handle causing the electric shock.

Appellants elected to be tried by a jury. The thirteen counts in the indictment, some of which charged all the appellants jointly, and some separately, were under s. 4 of 17 & 18 Vict. c. 138, the Gaming Houses Act, 1854, or s. 3 of 16 & 17 Vict. c. 119, the Betting Act, 1853. They were all convicted on all the counts.

S. 4 provides for the punishment on conviction of "any person being the owner or occupier, or having the use of any house, room or place, who shall open, keep or use the same for the purpose of unlawful gaming being carried on therein, and any person who, being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept or used by any other person for the purpose aforesaid, and any person having the care or management of, or in any manner assisting in conducting the business of any house, room or place opened, kept or used for the purpose aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room or place."

S. 3 enacts penalties against "Any person who, being the owner or occupier of any house, office, room or other place, or a person using the same, shall open, keep or use the same for the purposes hereinbefore mentioned [betting with persons resorting thereto, . . . any money or valuable thing being received by or on behalf of such owner, occupier, keeper or person" (using the same) "as or for the consideration for any assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter any money or valuable thing, . . . s. 1], or either of them; and any person who, being the owner or occupier of any house, room, office or other place, shall knowingly and wilfully permit the same to be open, kept or used by any other person for the purposes aforesaid. . . ."

Birkett, K.C. (with him *Wilfrid Bennett*) for the appellants. No witnesses were called for the defence at the trial; my submission that there was no case to go to the jury was overruled.

The grounds of appeal are (1) the verdict was against the weight of the evidence; (2) the learned Recorder was mistaken in law in letting the case go to the jury; (3) there was active misdirec-

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tion in the summing-up and non-direction; (4) there was misdirection on the facts; (5) the learned Recorder usurped the functions of the jury in telling them, in effect, that they must convict.

The gist of counsel's argument was that under the Gaming Houses counts the real question was whether use of this machine constituted unlawful gaming, and that that question was for the jury and not for the judge. The jury could have had no idea that they must decide whether the game was one of skill or chance. My contention is that this is a game of skill, and none the less because there is an element of chance, as in all games. Here there is nothing unfair; the chances are absolutely equal. The fallacy is in confusing chances and results. The bank only gets an advantage when the player is not skilful.

[SWIFT J.: Some games are absolutely illegal whether you play for money or not—others only become illegal in certain circumstances. When you play for money or money's worth you are "gaming." Once you get "gaming" in a house kept for that purpose you get a "gaming" house at common law, and all games played in it are unlawful.]

Birkett. But we are indicted under s. 4 of the Gaming Houses Act, 1854, not at common law, nor under the Gaming Act, 1845. S. 2 of the 1853 Act cannot be used to prove the offences, but is for purposes of punishment once an offence under the Betting Act is proved. S. 2 of the Act of 1853 deals with "gaming houses," and had I known that this point would be taken I should have asked for the indictment to be severed.

A game is not necessarily unlawful if carried on in a gaming house, nor does the house become a common gaming house because gaming is carried on there; there is no definition of "common gaming house." If s. 2 was to be invoked, there ought to have been a direction on it—on the chances being favourable alike to all the players. S. 2 is "Every house, room, office or place opened, kept or used for the purposes aforesaid . . . shall be deemed a common gaming house," within 8 & 9 Vict. c. 109 (1845).

[SWIFT J.: Do you dispute that here there is a bet?]

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Birkett. Yes; you cannot say that a man who tries to win a cokernut at a fair is "betting." As Hawkins J. said in *Carlill* v. *Carbolic Smoke Ball Co.*, 1892, 2 Q. B. at 491, to make a bet the real consideration must be the prospect of gain. On the counts under the Betting Act, 1853, the real question was—with what consideration did the players play? The prosecution brought no evidence on the point. It was not put to the jury, and they were not directed thereon. Above all, the learned Recorder insisted that the jury must take the law from him, and that in law appellants were undoubtedly guilty.

He cited *Peers* v. *Caldwell*, 1916, 1 K. B. 371; 85 L. J. K. B. 754; 32 T. L. R. 190; *Jenks* v. *Turpin*, 13 Q. B. D. 505; 53 L. J. M. C. 161; 30 L. T. 808; 15 Cox, C. C. 486; 49 J. P. 20; *Mackintosh* v. *Granata*, 1916, 53 S. L. R. 766; *Di Carlo* v. *M'Intyre*, 1914, Sessions Cas. (J.) 60, 65; *Pitt*, per Rowlatt J. (unreported except for the judgment in 79 J. P. (Newspaper) 148, March 27th, 1915).

AVORY J. referred to *Davies*, 1897, 2 Q. B. 199; 13 T. L. R. 405.

Sir Travers Humphreys (with him *D. L. Finnemore*) was not called upon.

The LORD CHIEF JUSTICE (*a*): The charges under the Act of 1854 were that Parker, as owner, occupier or a person having the use of a house, kept it for the purpose of unlawful gaming; that Parker permitted Kirby and Patrick so to use the house: and that Parker had the care and management of the house which was used for unlawful gaming. Finally, in another count the three appellants together were charged with using the house for unlawful gaming.

The charges under s. 3 of the Act of 1853 were that Parker, as owner or occupier, kept the house for the purpose of betting with persons resorting thereto, that he permitted Kirby and Patrick to use the house for that purpose, and that he had the care and management of the house; that the three appellants used

(*a*) This judgment is printed from a transcript supplied by the courtesy of the Prosecuting Solicitor for the Corporation of Birmingham.

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the house for the purpose of betting; that Parker, as owner or occupier, permitted the house to be kept for the purpose of money being received; and finally, that the three appellants used the house for that purpose.

Now in substance the facts of the case were not in dispute. It was common ground that the appellant Parker occupied the shop at 82, Monument Road, Birmingham, where he carried on a small business as a confectioner and tobacconist, and that between the 22nd and 26th of October last there were in that shop two automatic machines known as "Pickwick" machines of the kind which has been shown and explained to this Court to-day, and it was equally common ground that the appellant Kirby was the owner of the machines that were placed in the shop kept by Parker, and that Parker received 25 per cent. of the takings, and, moreover, that Mrs. Patrick was the agent for Kirby and collected the money.

With regard to the manner in which the machines were used or worked, it is not necessary to describe the process with any great particularity. It has been explained, and ocular demonstration has been given to the Court to-day. The method apparently is that a halfpenny has to be put into the slot. It is then possible for a person taking hold of the two handles to receive an electric shock. By turning a handle a ball can be brought into play, and the ball may then be caught in a cup moved by the hand of the person using the machine. If the ball is caught in the cup a check is given which may be exchanged in the shop for goods to the value marked on the check. It is impossible to know the value of the prize which will be received—it may be a penny or a shilling, or some amount between.

Evidence was given by the police about their actual experience. No evidence was called for the appellants, but Mr. Norman Birkett addressed the jury on their behalf and in the result the jury convicted, and the question is whether that conviction ought to be quashed.

Mr. Birkett has laid before the Court to-day three submissions:—

(1) The verdict of the jury is against the weight of the evidence.

(2) There was no case to go to the jury.

(3) Misdirection amounting in part to usurpation by the Recorder of the functions of the jury.

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To take the first two grounds first, it is to our minds clear that there was ample evidence to go to the jury under both of these statutes, that is, the Gaming Houses Act, 1854, and the Betting Act, 1853.

With regard to the complaint that the learned judge took it upon himself to decide questions which ought to have been determined by the jury, it is useful to recall the words used by Lord Russell of Killowen in the case of *Reg.* v. *Davies*, 1897, 2 Q. B. 199, where at page 202 we find the words, "But, further, it appears that the jury were asked whether the house was used for unlawful gaming, and whether the game of 'German Bank' as played there, was an unlawful game. These questions, however, are questions of law for the judge and not of fact for the jury, who must apply the facts to the definition of the law given by the judge."

With regard to the case under the Betting Act, we think that was concluded by the case of *Peers* v. *Caldwell*, 1916, 1 K. B. 371, the judgment in which case remains unimpaired. At page 379 in the judgment we find these words: "What we have to determine is whether there was any evidence on which the magistrate could find that the appellants were using these premises for the purpose of money being received as the consideration for a promise to give thereafter a valuable thing on an event relating to a game. I agree with Mr. Gordon Hewart that the test is what was the consideration for the halfpenny. If it was clear that these boys paid their halfpenny as entrance fees for the purpose of entitling them to take part in a game of skill the transaction would not constitute an offence under the second branch of the section. On the other hand, if the consideration of the halfpenny was solely the promise of the appellants to give the player two-penny-worth of sweets if the ball fell into the clown's cap, it is equally clear that the transaction did constitute such an offence."

In the present case the facts were all one way. In our opinion, therefore, there is no ground here for saying that there was no evidence upon which the jury might not properly convict, nor is there any ground for saying that the learned Recorder failed adequately to explain the matter to the jury in his summing up, or usurped to himself functions to be performed by the jury.

I desire to add two observations.

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We are told that some confusion has arisen about cases of this kind in various parts of the country. The law is perfectly clear. It depends only upon the vigilance and diligence of the police to put an end to what can only be regarded as a pest, and a most mischievous pest, because it operates on the minds of young persons and corrupts them in their youth.

Unfortunately s. 13 of the Criminal Appeal Act, 1907, provides that on the hearing and determination of an appeal to this Court no costs shall be allowed on either side. This is one of those cases which make one regret that there is a provision of this kind. If there had been no such provision, this is obviously a case in which it would have been right for the Court to order that the costs incurred in this appeal should be paid by the appellants.

Appeals dismissed.

H. J.

Solicitor for Appellants—*A. Hall-Wright*, Birmingham.

Solicitor for Respondents—*M. P. Pugh*, Birmingham.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SHEARMAN AND MR. JUSTICE SWIFT.

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SAMUEL ADOLPHUS DAVID PUNCH.

The true rule concerning attempts to commit offences was laid down in H. Robinson, 1915, 2 *K. B.* 342.

When the charge is attempting to obtain by false pretences, "intent" and "attempt" must be carefully distinguished.

Appellant was convicted at the Liverpool City Sessions on January 7th, 1927, of attempting to obtain money by false pretences, and was sentenced by the Deputy-Recorder to nine months' imprisonment with hard labour.

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Basil E. Nield for appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present. Of ten pretences alleged in two counts the learned Deputy-Recorder withdrew six from the jury, and at the close of the case for the prosecution I submitted that there was "no case." The Deputy-Recorder declined so to rule. The verdict was against the weight of evidence and there was misdirection. Nothing that could be called an attempt was proved; there was nothing like a "proximate" act. Mere intention to commit an offence does not amount to an attempt: *Robinson* (below). The prosecution did not prove that appellant had not a device for which he had, as he said, made a specification, nor that he was not about to take out a patent and to float a company to work it. When he interviewed persons who came in answer to his advertisement he did not ask for money, but suggested that they should consider the matter.

The charges alleging that appellant "was then about to float a company" were bad for futurity: *Hughes*, 1927, W. N. Feb. 12th: c. q. Grave prejudice must have been created by counsel for the prosecution stating *inter alia* "there was a very general inference that appellant did not go to the Home Office," when there was no evidence that he did not.

In summing up the learned Deputy-Recorder told the jury—the issue is, was there a genuine company or not? Mere preparation does not amount to an attempt: "The mere intention to commit a misdemeanour is not criminal—some act is required, and we do not think that *all* acts towards committing a misdemeanour are indictable," *per* Parke B., *Eagleton*, D. & P. 538: 1855. (He was stopped by the Court.)

[AVORY J.: This Court gave leave to appeal on the ground that it did not appear what evidence there was of an attempt. In *Robinson*, 1915, 2 K. B. 342; 84 L. J. K. B. 1149; 24 Cox, C. C. 726; 113 L. T. 379; W. N. 133; 79 J. P. 303; 31 T. L. R. 313; 59 S. J. 366; 11 Cr. App. R. 124: c. q., this Court held that "an indictment for an attempt to commit a crime must be proved by acts immediately (and not remotely) connected with the crime" (obtaining by false pretences).]

Maxwell Fyfe for the Crown. An attempt to commit an

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offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series had not been interrupted. Despite *Robinson,* it is not necessary to prove an actual "approximate" act if there is evidence of intent with acts leading directly to the offence: that is, an attempt. That case did not overrule *Laitwood,* 4 Cr. App. R. 248: 1910, where it was held: "The fact that a final step still remains to be taken to consummate an attempt to obtain by false pretences does not prevent the acts done amounting to such an attempt if those acts would have culminated in the full offence, if accused had not been interrupted." *Laitwood* shows that in attempts to obtain by false pretences there need not be an actual request, if one can be implied from the circumstances. That is exactly this case.

[AVORY J.: No; there is this difference: *Laitwood* represented that in fact he had a business. The authorities are quite clear: the act proved must be so proximate that nothing remains to be done but to commit the crime: *per* Kennedy J.: "It is always necessary that the attempt should be evidenced by some overt act forming part of a series of acts which, if not interrupted, would end in the commission of the actual offence": *Linneker,* 1906, 2 K. B. 99; 75 L. J. K. B. 385; 94 L. T. 856; 54 W. R. 494; 70 J. P. 293; 21 Cox, C. C. 196; 22 T. L. R. 495; C. C. R.]

Two of the pretences left to the jury here, though promises about the future, postulate an existing state of mind, and are therefore pretences of existing facts: *Edginton* v. *Fitzmaurice,* 29 Ch. D. at 483; 55 L. J. Ch. 650; 53 L. T. 369; 50 J. P. 52; 33 W. R. 911: 1885: C. A.

Appellant admitted in cross-examination that he did ask for money: "I did not say that I did not want any money. I asked for money not for myself but for the company." In *Howarth,* 11 Cox, C. C. 588: 1870; C. C. R.: "An indictment charged that the prisoner falsely pretended that he had got a carriage and pair and expected it down to T. that day or the next, and that he had a large property abroad." Though the Court held that there was "no direct evidence" yet as "from all the facts of the case . . . the jury might well infer that the pretences

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were false," the conviction was upheld: *i.e.*, falsity may be gathered from surrounding circumstances.

[SHEARMAN J. referred to *Button*, 1900, 2 Q. B. 597; 69 L. J. Q. B. 901; 83 L. T. 288; 48 W. R. 703; 19 Cox, C. C. 568; 64 J. P. 600; C. C. R.: though prisoner never asked for the prize which he had "won" by a false handicap: he was rightly convicted, as he ran in the race.]

Appellant's admissions in his evidence are evidence of attempt.

AVORY J.: The learned Deputy-Recorder was evidently in doubt whether he ought to leave any of the alleged false pretences to the jury. There was no evidence that appellant ever said that he wanted a manager or that he had floated a company: what he said amounted to this: "If I get my patent, and if I float my company, I shall want a manager, &c."

Further, a substantial point was overlooked both by the judge and by counsel: there was no evidence for the jury that appellant ever attempted to obtain any money. The police, who were hidden within hearing of the interviews, interfered before they had evidence of any actual attempt.

Conviction quashed.

H. J.

Solicitors for Respondents—*The Town Clerk of Liverpool.*

FRANK RICE.

The exercise of the jurisdiction under s. 4 of the Criminal Appeal Act, 1907, *depends on the circumstances of the particular case, whatever may be the opinion of the judge who tried it.*

Appeal against conviction on certificate.

Appellant was convicted on February 10th at the Lincoln Assizes before Branson J. of having carnal knowledge of a girl under sixteen years of age, and was sentenced to two months' imprisonment in the second division.

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FRANK RICE.

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Sandlands for appellant (who was not present). The verdict was wrong, and so the learned judge thought. That, no doubt, is not conclusive in my favour, but *Schrager*, 6 Cr. App. R. 254: 1911: c. q.; *J. R. Parker, ib.* 285: c. q.; and *W. Hart*, 10 Cr. App. R. 176: 1914: c. q., show that, if this Court doubts, it will reverse a verdict. S. 4 (1) of the principal Act (1907) says that the Court "shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, &c. . . ."

Appellant was not represented before the magistrates, and for this reason did not formally deny the charge there. The only corroboration was the evidence of the girl's father, who admitted that his memory and his hearing were bad and who said that, after appellant had offered him a sum of money "to settle it," and he had replied that he must consult his wife, he nevertheless went straight off to the police and charged the appellant. The girl's story was impossible—that without a word beforehand, quite suddenly appellant had ravished her; that she, a big, strong girl, screamed and struggled for fifteen minutes with a man of very slight build: rape, in the circumstances, was impossible. But most conclusive of all was the fact that the two unimpeachable witnesses for the defence who proved an *alibi* were never challenged on their veracity or capacity to remember the details of their stories. Appellant was a man of excellent character, happily married: the (mixed) jury was out about an hour.

[SHEARMAN J.: In *H. G. Moor*, 15 Cr. App. R. 31: 1920: though the learned Commissioner of the Central Criminal Court disagreed with the conviction and gave a certificate, this Court upheld the verdict.]

Hadfield for the Crown. That case and *Eliz. Perfect*, 25 Cox, C. C. 780; 117 L. T. 641; 12 Cr. App. R. 273: 1917, are in my favour. Till the trial appellant never denied his guilt, not even when he was arrested on a warrant. [AVORY J.: No doubt there was the usual caution.] I did not cross-examine the witnesses for the *alibi* as I did not think them "worth powder and shot"—perhaps an error of judgment: but I relied on the facts, especially

the corroboration. Each man suggested to the girl as father of her child she categorically denied.

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MR. JUSTICE AVORY (*a*): This case must be added to the list of difficult cases which have been already reported in which this Court has to determine whether it shall exercise the jurisdiction conferred upon it by *s.* 4 of the Criminal Appeal Act, which provides: "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal." It is unnecessary to repeat what has been said over and over again by this Court in cases where they have been invited to exercise this jurisdiction and in which the presiding judge at the trial has expressed an opinion that the verdict was unsatisfactory. The opinion of the presiding judge is, of course, in such a case, not conclusive. On the other hand, it is a factor to be taken into consideration because, while it is true that this Court must always bear in mind that the jury have seen the witnesses and had the opportunity of forming their own opinion of their credibility, the judge also has had the same opportunity, and the fact that he certifies that in his opinion the verdict was unsatisfactory means that he has also formed his opinion on the appearance and demeanour of the witnesses.

In this present case, the story told by the principal witness, the girl, was in many respects an improbable story. It was one which therefore required clear corroboration, and the corroboration which was forthcoming in this case was the evidence of her father, who was exceedingly deaf and who admitted at the trial that his memory had been affected, whether that meant by some accident or by illness we are not told. He was a man with defective memory and of very defective hearing, and the alleged corroboration consisted entirely in his account of a conversation which he

(*a*) This judgment is printed from a transcript supplied by the courtesy of the Director of Public Prosecutions.

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said he had had with the accused. All the material admissions which the father deposed to as having been made by the appellant were emphatically contradicted by the appellant himself in the witness-box, and it is obvious that the evidence of such a witness was capable, at all events, of explanation on the ground that he had misheard what was said or that his memory had betrayed him. In answer to this case for the prosecution there was evidence establishing that it was physically impossible that the appellant could have committed the offence at the time alleged, and the chief witness, who deposed that the accused never left his shop until after half-past eight, was not cross-examined by the learned counsel for the prosecution. Mr. Hadfield has given us his explanation as to why he did not cross-examine him, but there the fact remains, that the evidence of that witness was not disputed by any question put to him in cross-examination. The other witness who was called, a man named Fletcher, unless his evidence was deliberately untrue, also proved that it was impossible that the appellant could have committed this offence. In the opinion of the Court this verdict was unreasonable, having regard to the evidence, and that there was a miscarriage of justice on the part of the jury in convicting this man upon that evidence, his own answer to it being really left uncontradicted. One other thing requires notice, and that is we are informed by the learned counsel for the prosecution that he relied to a great extent in his address to the jury on the fact that the appellant, when before the magistrates, had not in terms denied this charge, that he had not cross-examined the witnesses or had not interrupted the proceedings by saying that a man was not telling the truth when he was giving his evidence in the witness-box. It is quite clear that observations of that kind may have had some weight with the jury, but they ought not to have had any weight because with a man of good character like this, who has had no experience of police court proceedings, he may very well have thought that he would be doing something irregular if he interrupted the proceedings by making any such statement, and he may very well have thought when he was warned by the usual caution that anything he did say would be taken down in writing and might be given in evidence against him it would be better to say nothing and reserve his defence. Therefore, bearing in mind that every case must depend upon its own particular circumstances, we have come

to the conclusion that this verdict must be set aside, the appeal allowed and the conviction be quashed.

Conviction quashed.

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Solicitors for Appellant—*Collyer-Bristow & Co.*

VICTOR LESTER.

A reference in evidence to a defendant's previous conviction may become relevant by the nature of the cross-examination.

Appellant was convicted at the Hampshire Sessions on January 18th, 1927, of shop-breaking and was sentenced to three months' imprisonment with hard labour, to follow an existing term of three years' penal servitude.

Appellant in person.

The offence was committed during appellant's escape from penal servitude (to which he was sentenced in July, 1925), and consisted in his breaking into a refreshment-room and consuming wine, &c.

Walter Lloyd was instructed (only) to assist the Court if he was required. The Home Office had ordered this prosecution, and magistrates would welcome it in order to get a ruling of the Court on the kind of sentence proper in cases where escaped prisoners were convicted. There was no reported case.

The Court informed the appellant that if he wished to prosecute his appeal against the (consecutive) three months, he could do so without risk as the Court would not increase that term: appellant accordingly appealed against sentence.

MR. JUSTICE AVORY (*a*): This appellant, Victor Lester, was convicted at the Hampshire Quarter Sessions for breaking into a shop (it was really a refreshment-room), and stealing some wine

(*a*) This judgment is printed from a transcript supplied by the courtesy of the Director of Public Prosecutions.

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and other things, and he was sentenced to three months' hard labour, to commence at the expiration of a term of three years' penal servitude which he was then serving, the fact being that while under that sentence of three years' penal servitude, which was passed upon him in the year 1925, in July of 1926 he escaped from prison, and it was while he was at large that he broke into this refreshment-room and stole articles of food which may have been necessary for his immediate sustenance. He also asks for leave to appeal; in fact, he was granted leave to appeal against conviction as well as the sentence. The ground on which the appeal against conviction was permitted was, as he himself complained, that while he was upon his trial the police officer who arrested him mentioned in the hearing of the jury that he was an escaped convict. That was a matter which appeared to require investigation, because it cannot be too clearly understood that police officers, or any other witnesses, are not entitled, unless they are forced by the circumstances or unless the man's character has been put in issue, to introduce to the knowledge of the jury the fact of a man's previous bad character. But upon investigation and consideration of the shorthand notes of what took place in this case we have come to the conclusion that the police officer in this case was forced by the nature of the cross-examination to make the statement, which he obviously was not anxious to make and which he had avoided making until he was so pressed in cross-examination, that he had no option. The fact is that the prisoner was seen by the officer running along the railway line and the officer had at that time information that a convict had escaped. Seeing the prisoner in convict dress running along the railway line he pursued him, he came up to him, and, after some struggle, he arrested him. In order to effect the arrest he had to use his truncheon, and in using his truncheon he knocked off from the prisoner's head a cloth or duster which he was wearing in place of a cap or hat. That duster was subsequently identified as having been stolen from the refreshment-room when the other articles were stolen.

The learned counsel who appeared for the prisoner, cross-examining the officer, said this: "Why did not you pick up that duster at the time?" The officer's first answer was: "Because I had to secure the prisoner." "I ask you again," said learned counsel, "why neither you nor the other officer picked up that

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duster then and there?" "I say it was because I wanted to get the prisoner to the police station. I went up the following morning and got the duster." "But why not have picked it up the same night if it was so important as my friend seems to think it is? Why did not you pick it up that night if as you tell the Court the prisoner was actually wearing it on his head?" If the learned counsel had been content with the previous answer, "Because I wanted to get the prisoner to the police station," no mischief would have been done, but he persists in saying: "Why did not you pick it up that night even if you were anxious to get him to the police station?" and then the officer, apparently finding no escape, no other answer which he could give except the true one, said: "Well, the prisoner was an escaped convict, and it was my duty to," and he was going to say: "My duty to take him to the station as quickly as possible." Then Mr. Steer, the counsel, having done the mischief by pressing this man, says: "I object to this as being inadmissible," and the learned Chairman said: "I do not know that I can shut it out now. You may consider whether it is not in your favour." Mr. Steer: "I formally protest against it as being inadmissible." Then Mr. Lloyd, counsel for the prosecution, said: "My friend has brought it on himself by his cross-examination," and then Mr. Steer, not content with that, further provokes the constable and says: "I repeat my question. We have heard that importance is attached to this duster. I want to know why neither you nor Campbell picked up that duster that night." And then the officer repeats: "The prisoner was an escaped convict, and it was my duty to get him to the police station, first of all. I returned the next morning for the duster." We have come to the conclusion that in the circumstances of this particular case the officer is not to be blamed for having, after pressure of this kind put upon him, answered the question in the way in which he did. With regard to the sentence, in view of the fact that this man at the time he committed the offence was an escaped prisoner and that he broke into these premises for the sole purpose of getting food, and in view of his dress, it probably was quite impossible for him to get it anywhere else honestly, we have come to the conclusion that the sentence which was passed upon him of three months' hard labour, to commence at the expiration of his present term of penal servitude, should be altered to a sentence of three months' hard labour to run

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concurrently with the sentence that he is serving, and that will be the result. This sentence will run from the time of conviction.

H. J.

Sentence varied from a consecutive to a concurrent term.

ARTHUR MULLEY.

Conviction quashed on the ground of evidence improperly admitted.

Appeal against conviction at the Bury St. Edmunds Borough Sessions before the Recorder, on 31st January, 1927, for larceny of a fowl: the sentence was four and a half months' imprisonment with hard labour.

Victor Raikes for appellant (under s. 10 of the Criminal Appeal Act), who was not present. No doubt appellant told untruths about his possession of the fowl, but there was doubt whether he stole the one found on him, and much more whether it was the prosecutor's. But in any case, there was no justification whatever for the evidence of a police officer—quite unprovoked—that defendant dealt in stolen property.

[SWIFT J.: And a warder in the dock made a statement against him, not under oath.]

Grafton Prior, for the Crown, could not defend the evidence of previous dishonesty: he had not heard it, and perhaps no one in Court did. The Recorder cautioned the jury adequately about the doubt in the case.

AVORY J.: There was grave suspicion in this case, but no justification for the admission of evidence of bad character, and the conviction must be quashed.

Conviction quashed.

H. J.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SHEARMAN AND MR. JUSTICE SWIFT.

JOHN ALEXANDER BENSON, *alias* JOHN JOYE. 1927 21 *February.*

Conviction quashed on the ground of a mistake in law.

Appeal against (i) conviction and sentence and (ii) sentence.

Appellant was convicted on January 28th, at the Mold Assizes, of bigamy and of carnal knowledge of a girl under sixteen years of age, and was sentenced by MacKinnon J. to (two concurrent terms of) two years' imprisonment with hard labour.

R. G. S. Bankes for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present.

E. A. Hawke for the Crown.

Counsel submitted that at the trial it had been assumed that the Criminal Law Amendment Act, 1922, 12—13 Geo. V. c. 56, governed the charge of carnal knowledge, but that Act, which came into force August 4, 1922, was not retrospective, and the indictment alleged the offences in February and March, 1921. Consequently defendant was deprived of a certain defence which was open to him under the Criminal Law Amendment Act, 1885, 48—49 Vict. c. 69.

The Court stated that it would quash the conviction for carnal knowledge and proceed only with the appeal against sentence for the bigamy—in which it directed certain inquiries to be made.

Inspector Keech, who had presented a report to the Court, was called and examined by *Hawke,* and cross-examined by *Bankes,* who also addressed the Court. 14 *March.*

AVORY J.: The circumstances of this case are exceptional. The report we have heard to-day of appellant's career justifies what a Recorder said of him in 1912, viz., that he was "the worst rogue he had ever had before him." That report is substantially

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that presented to MacKinnon J. by the Deputy Chief Constable of Flint at the trial, and we act on that report, and not on any evidence (*a*) we have heard to-day; we deal only with the facts of the bigamy established at the trial, and we alter the sentence to one of three years' penal servitude, which was the sentence orginally imposed by MacKinnon J. Appellant has persisted in this appeal against sentence after his conviction on the other charge was quashed, but as leave was given to appeal, this sentence will run from the date of conviction.

One conviction quashed.

Sentence on another increased.

H. J.

GEORGE HENRY FRIER.

Maximum term of detention in a Borstal institution increased in appellant's own interest.

Appeal against sentence.

Appellant was sentenced, at the Rochester City Sessions, on February 10th, for shopbreaking, to two years' detention in a Borstal institution.

Appellant in person. I am twenty-one years of age on the 16th inst.

[The COURT: A police officer stated that you were born on March 16th, 1908.]

Appellant denied that this was correct.

AVORY J.: Young offenders often overstate their age in order to be sent to prison, but the Court must think of the interests of the prisoner. The Court below did not believe that he was nearly

(*a*) S. 9 of the Criminal Appeal Act, 1907, provides—"in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial."

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twenty-one years old, and, on his own showing, he is not now, and was not at his trial, of that age. In his own interest we increase the term to a maximum of three years, but it depends on his own conduct whether he is detained for the full period.

Sentence increased.

H. J.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SHEARMAN AND MR. JUSTICE SANKEY.

AMY WALKER.

"Good character" of the accused within s. 1 (f) (ii) of 61 & 62 Vict. c. 36 (a), the Criminal Evidence Act, 1898, means not only general good character but any claim to good character incidentally put forward by the accused.

Appeal against conviction and sentence.

Appellant was convicted, on February 14th, at the Central Criminal Court, of attempting to procure a girl under twenty-one years of age for immoral purposes, and was sentenced by the Common Serjeant to eighteen months' imprisonment with hard labour.

F. W. Wallace for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present.

(a) S. 1 (f) of 61 & 62 Vict. c. 36, the Criminal Evidence Act, 1898, runs: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged or is of bad character, unless . . . (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

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Percival Clarke, for the respondents, was not called upon.

F. W. Wallace. Prisoner, while being examined in chief about hiring a room from a Mrs. Reilly for herself and the girl alleged to have been procured, was asked by me, "Did you have some talk with Mrs. Reilly about her room having been empty for some weeks before?" She replied; "Yes, she said her room had not been let for some weeks. She said she had a girl there who wanted to bring a man in, and she said she would not allow that. I said there would be nothing of that sort about us. She said she could see that." Counsel for the Crown thereupon cross-examined her as to her character, and elicited the fact that her husband had divorced her some years previously.

It is submitted that, especially on a charge of procuration, proof of the prisoner's divorce was evidence of bad character. The questions eliciting that evidence were inadmissible under s. 1 (f) of the Criminal Evidence Act, 1898. By her answer, quoted above, the prisoner had not given evidence of good character within s. 1 (f) (ii) of that Act so as to render them admissible. The said statute draws a distinction between questions by the prosecution "tending to show" bad character, and questions by defence "with a view" to establish good character. In other words, questions whose *effect may be* to show bad character are expressly prohibited to the prosecution, and only questions whose *purpose is* to establish good character deprive the prisoner of that protection. It is submitted that the words "has given evidence of good character" must be interpreted in the light of that vital distinction, and must mean "has given evidence of good character" generally, not inadvertently, but deliberately and with intent, as, *e.g.*, by calling witnesses to character, not merely as here, *ad hoc*, so to say.

Here the prisoner's answer was a natural part of the *res gestæ* of the interview. The words which "let in" evidence of divorce were not the necessary or inevitable result of the question put to the prisoner. She is therefore entitled to protection. Hence the cross-examination was inadmissible, and there has been, having regard to the charge and the evidence wrongly admitted, a substantial miscarriage of justice within the proviso to s. 4 of the Criminal Appeal Act, 1907. The fact of the divorce must seriously have affected the minds of the jury in a doubtful case.

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He referred to *W. Baldwin,* 133 L. T. 191; 89 J. P. 116; 69 S. J. 429; 28 Cox, C. C. 17; 18 Cr. App. R. 175: 1925: c. q.

In answer to the Court, *Wallace* said that he had not objected to the answers at the time, as such a course would only have served to impress the facts on the jury.

The Court had no doubt that the questions objected to were properly admitted. Indeed, in view of the questions put to the girl in cross-examination by the defence, such questions were perhaps admissible owing "to the nature or conduct of the defence."

Appeal dismissed.

H. J.

Solicitors for the Respondents—*Wontner and Sons.*

HARRY HAYWARD.

By virtue of s. 10 (5) *of* 8 *Edw.* 7, *c.* 59, *the Prevention of Crime Act,* 1908, *evidence of a previous conviction (other than the three statutory) of the accused may be given without the production of a certificate of such conviction.*

Appeal against sentence, and application for leave to appeal against conviction as a habitual criminal.

Appellant pleaded guilty, at the Central Criminal Court, to shopbreaking, and was convicted, as a habitual criminal, on February 10th, and was sentenced by the Common Serjeant to three years' penal servitude and six years' preventive detention.

A. Crew for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The practice in these cases is to prove the three statutory convictions strictly, and for an officer to read out from a list the other convictions. In this case the prosecution produced neither the record nor any identification of the prisoner as the person convicted; hence they relied on hearsay evidence of facts, which ought in a criminal trial to be proved strictly by proper evidence. It is submitted that, unless these

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convictions are proved by witnesses who can identify prisoner as the person convicted, they cannot be properly cross-examined on their own knowledge on the conviction themselves, or in the interval between those convictions, and unless the procedure, imperative in other criminal trials and before verdict, is followed, there is no protection against mistaken identity.

Counsel cited *G. Franklin*, 3 Cr. App. R. 48; 74 J. P. 24; 54 S. J. 217: 1909; *A. Stewart*, 4 Cr. App. R. 175; 74 J. P. 246: 1910: c. q.; *Chatway*, 5 Cr. App. R. 151: 1910; *Cullifford*, 6 Cr. App. R. 142; 75 J. P. 232: 1911: c. q.; *Westwood*, 8 Cr. App. R. 273; 77 J. P. 379; 29 T. L. R. 492: 1913; *P. Neilson*, 109 L. T. 212; 78 J. P. 158; 23 Cox, C. C. 685; 30 T. L. R. 125; 9 Cr. App. R. 218: 1913: c. q.; *A. Taylor*, 19 Cr. App. R. 146: 1926: c. q.—all habitual criminal cases. He also cited *J. Seymour*, 17 Cr. App. R. 128; 87 J. P. 148: 1923; and *A. Turner*, 18 Cr. App. R. 161: 1924; *Turnbull*, 19 Cr. App. R. 155: 1926. He submitted that *Franklin* should be reviewed by the Court and *Turner* and *A. Stewart* followed (*a*).

Eustace Fulton, for the Crown, was not called upon.

AVORY J. (*b*): This appellant was convicted, before the learned Common Serjeant, on an indictment charging him that he, on the 31st December last, broke and entered a shop with intent to steal, causing grievous bodily harm to and wounding Joseph Friend, police constable, with intent to resist his lawful apprehension. He was also charged with being a habitual criminal. He pleaded guilty to the shopbreaking, and the charges of wounding the police officer were not proceeded with. He was found by the jury to be a habitual criminal, and was sentenced to three years' penal servitude and six years' preventive detention. His learned counsel has taken a number of points on his behalf, suggesting that his conviction was wrong as a habitual criminal, and also suggesting that the sentence was wrong in the sense that the offence to which he pleaded guilty was not one deserving

(*a*) But in that case, Jelf J. in giving the judgment of the Court, said, "We do not say that it is necessary to prove them (the non-statutory convictions) in any particular way."

(*b*) This judgment is part of a transcript supplied by the courtesy of the Clerk of the Peace for Middlesex.

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a sentence of penal servitude, and therefore that it could not be followed by a sentence of preventive detention. With regard to that point, it is better to deal with it at once, and in the opinion of the Court the offence to which he pleaded guilty, in view of his previous record, was clearly one which deserved a sentence of penal servitude. The main point which is taken by counsel is that, apart from the three previous convictions against the accused since he attained the age of sixteen which have to be proved as the basis of a charge of this nature against a man, evidence was given of a number of other convictions, and that those other convictions were not strictly proved in the sense that there was no record of the convictions produced and evidence identifying the accused with those previous convictions. Apart from the authorities on this point, there is a provision in the Act of Parliament, the Prevention of Crimes Act, 1908, under which this charge is preferred which has not been referred to by counsel, but which has been frequently referred to in previous decisions of this Court. Sub-s. (5) of s. 10 of the Act provides that "without prejudice to any right of the accused to tender evidence as to his character and repute, evidence of character and repute may, if the Court thinks fit, be admitted as evidence on the question whether the accused is or is not leading persistently a dishonest or criminal life." Under that provision alone such evidence as was given in this case of the previous convictions might properly be admitted, but quite apart from that, this Court decided in the case of *Franklin* (above) that evidence, such as was given in this case, was properly given, even though there was no personal identification of the accused, if there was any evidence that the accused had admitted those previous convictions, and that principle has been acted upon in practice ever since, notwithstanding the report of the case of *Stewart* (above), in which it has been already pointed out, the Court never decided to the contrary, but in which it appears by the head-note as if it had been a decision that all the convictions in such a case should be strictly proved. Now, in the present case, there was obviously evidence before the jury that the accused admitted those other convictions when the notice was served upon him by a police officer, nearly a fortnight before the trial, containing a list of those previous convictions which it was proposed to give in evidence. When the police officer

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began to read it, the appellant said: "You do not want to read it; I know all about them, as I have had them before." His learned counsel says now, no doubt quite truly, that that probably referred to a previous occasion when he had had them read to him. Whether it does or not, it is quite obvious that it was evidence upon which the jury might infer that he had admitted them. When a man who is told that it is going to be alleged against him that there are a number of previous convictions says, "I do not want you to tell me the particulars; I know all about them, as I have had them before," it would be strange, indeed, if a jury did not infer that he was thereby admitting them. In addition to that, after this evidence had been given by the police officer, the accused being represented by counsel, he did not think it necessary or desirable to go into the witness box to dispute any of them. From that fact alone the jury might also draw the inference that he was not disputing them.

Appeal dismissed.

H. J.

JOHN LAWRENCE.

[*See last headnote.*]

Appeal against sentence.

Appellant pleaded guilty to burglary, at the Middlesex Sessions, and was found to be a habitual criminal, on February 5th, and was sentenced by the Deputy-Chairman to three years' penal servitude and seven years' preventive detention.

Appellant in person.

Frederick Levy, for the Crown, was not called upon.

At the trial appellant's counsel took the same point as was argued in *Hayward* (above).

SANKEY J.: The point of law has just been decided by this Court, not for the first time.

Appeal dismissed.

H. J.

CHARLES HARVEY.

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Sankey J.

The term of a sentence must precede the serving of a romanet.

Application for leave to appeal against conviction and sentence.

Applicant, who was not present, was convicted, at the Manchester Assizes, of burglary, on March 3rd, and was sentenced, by Wright J., to four years' penal servitude, to run from the termination of a subsisting term of penal servitude.

Shearman J.: The form of this sentence is contrary to the practice, and the learned judge has asked us to rectify it. The application is dismissed, but the sentence will run from the date of conviction.

Sentence varied.

H. J.

JEREMIAH (or JOHN) ANDREWS.

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There should be discrimination between the sentences of persons jointly accused in view of their previous records and ages, and account should be taken of the period of detention before trial.

Appeal against sentence, by leave of Talbot J.

Appellant pleaded guilty, at the Stoke-on-Trent City Sessions, on February 15th, of shopbreaking and stealing groceries, and was sentenced by the Recorder to twelve months' imprisonment with hard labour.

Appellant in person.

Avory J.: Appellant was indicted with another man, who was convicted, had been previously convicted, and was also sentenced to twelve months' imprisonment with hard labour, and does not appeal. Appellant has not been previously convicted; he is, according to the calendar, only twenty and a half years old, and was in custody seventy-eight days before the trial. The learned Recorder seems to have overlooked this fact, and the dis-

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tinction of the two cases. We bind him over in his own recognisance of £5 for two years on condition that he proceed to Darlington (where his father is) and put himself under the probation officer there.

Sentence reduced.

H. J.

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21 & 28 *March.*

ALEXANDER BERG, ROBERT BRITT, CONSTANCE CARRÉ, BERT LUMMIES.

A "disorderly house" at common law is a house which is so conducted as to violate law and good order.

Letters, if found in such a house referring to unnatural practices, may be given in evidence against a person charged with keeping such a house on the principle of A. Thompson, 1918, *A. C.* 221.

Appeals against conviction.

Appellants were convicted, after a six days' trial ending on February 22nd, all of a common law conspiracy to corrupt the morals of and to debauch persons resorting to a certain disorderly house, Britt and Carré also of keeping that disorderly house, and Lummies also of aiding and abetting them therein, and were sentenced by the Recorder, Berg to six months' imprisonment in the second division, Britt to fifteen months' imprisonment with hard labour, Lummies to eight months' imprisonment in the second division, and Carré to be bound over. On March 21st, appellants, who were present, also (except Carré, who was not in custody) applied for leave to appeal against sentence, but on the 28th, when the three in custody were not present, that application was withdrawn.

Sir H. Curtis Bennett, K.C. (with him *Frampton*), for Britt and Carré.

Byrne for Berg.

Keeves for Lummies.

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Sir Travers Humphreys for the respondent, the Commissioner of Police.

Curtis Bennett. It is admitted that the house, 25 Fitzroy Square, belonged to Britt (with whom Carré lived there) and that Berg was free of the house. Lummies was merely a nephew of Britt, and only stayed there at week-ends. It is submitted that letters (undoubtedly indecent) found there addressed to Britt were improperly admitted in evidence, and must have influenced the jury: they could only amount to evidence of bad character, which, of course, was inadmissible. The letters had no bearing on the keeping of a disorderly house. This case could be easily distinguished from *A. Thompson*, 1918, A. C. 221; 87 L. J. K. B. 478; 26 Cox, C. C. 189; 118 L. T. 418; 1918, W. N. 21; 82 J. P. 145; 34 T. L. R. 204; 62 S. J. 266; 13 Cr. App. R. 61.

[AVORY J. referred to *Lovegrove*, 1920, 3 K. B. 643; 15 Cr. App. R. 50.]

These were instances of cases establishing identity by letters, &c. As Lord Parker said in *Thompson*, 13 Cr. App. R. at p. 68: "It seems to me an extraordinarily dangerous thing to say that you may rove over everything in a man's possession to see whether he has anything that points to his character as being that of a man likely to commit a crime."

The photographs which the police took when they raided the house ought not to have been given in evidence: it is true that they asked appellants and others whether they objected, but they ought to have warned them that they would be used against them on their trial, and they ought not to have posed them in certain attitudes: naturally, those of them who were dancers or actors were dressed for their parts.

This indictment was framed on that in *Higginson*, 2 Burr. 1233: 1762, "for a nuisance in keeping a disorderly house," but nothing is mentioned but "fighting of cocks, boxing, playing at cudgels and misbehaving themselves." Though the police kept observation twelve times from December 5th to January 15th, there was not the faintest evidence of the practices suggested. Stephen in the *Digest*, 7th ed., 1926, Art. 258, says: "The

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following houses are disorderly houses, that is to say, common bawdy houses, common gaming houses, common betting houses, disorderly places of entertainment": none of these is suggested here. In his summing up the Recorder adopted Webster's definition under *disorderly*: "Not regulated by the restraints of morality; unchaste; of bad repute, as a *disorderly* house."

[AVORY J.: Art. 265 in the *Digest* is: "A disorderly inn is an inn kept in a disorderly manner, and suffered to be resorted to by persons of bad character for any improper purpose."]

These houses—within the definition—must be *common*.

[SHEARMAN J.: In some way it must be "open house": it must be a question of fact in each case.]

This is not like *Saunders and Hitchcock*, 13 Cox, C. C. 116; C. C. C. R.: 1875, where the public were admitted by payment only to see an indecent exhibition in a booth or a racecourse.

[SHEARMAN J. referred to *Jenks* v. *Turpin*, 13 Q. B. D. 505; 53 L. J. M. C. 161; 15 Cox, C. C. 486; 49 J. P. 20; 50 L. T. 808: 1884; and to *Harrison*, 8 New South Wales L. R. 57: 1887, "On an indictment [at common law] for keeping a brothel, it may be sufficient in the circumstances of the case to prove what took place on one night only. It is not necessary to prove that the accused actually received any gain or profit": *per* the Supreme Court.]

Byrne adopted the argument of *Curtis Bennett, K.C.*: no doubt there was evidence of agreement among these appellants, but there was no evidence to show that they agreed "to corrupt the morals of and to debauch the lieges," &c.

Keeves also adopted *Curtis Bennett, K.C.'s* argument: *Jenks* v. *Turpin* shows that to convict there must be proof of taking some part in the management, but his client only stayed there at week-ends with his uncle. *Fairburn* v. *Evans*, 1915, 1 K. B. at 222, was distinguished by Ridley J. from *Jenks* v. *Turpin*.

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ALEXANDER BERG, ROBERT BRITT, CONSTANCE CARRÉ, AND BERT LUMMIES.

Avory J.
Shearman J.
Sankey J.

Travers Humphreys. The letters here had a direct relation to the offence charged: they were addressed to Britt, who lived there, and to Lummies, who lived elsewhere, but they were kept in the house, and it is the preservation of them, not the contents, which is evidence against the appellants. A house becomes "disorderly" by reason of its frequenters. In a brothel case you can prove that the frequenters are common prostitutes. The Recorder's definition was his own, not that of the prosecution: Wharton's Law Lexicon and the Oxford *New English Dictionary* do not define "disorderly house." There must, of course, be a common nuisance, but without explanation a jury would not understand that phrase: it is for them, as the Recorder told them, in this and many other cases to fix the standard of decency. If the jury believed the evidence they must have convicted in any sense of the term "disorderly house."

AVORY J.: It has been objected that this prosecution is of a novel kind, but in *Brailsford*, 1905, 2 K. B. at 739, Sir R. Finlay A.-G. remarked that it "was pointed out by Parke B. in his observations on the codification of the criminal law 'the rules of the common law have the incalculable advantage of being capable of application to new combinations of circumstances perpetually occurring' (see Parliamentary Papers for 1854—copies of the Lord Chancellor's letters to the judges and their answers) . . . It is a well ascertained principle of the common law that acts involving public mischief are indictable misdemeanours" (*a*). Stephen's definition [above] is not meant to be and is not exhaustive. An indictment for keeping a disorderly house for cock-fighting, which was held good, will be found in 3 Chitty's Criminal Law, 673 [1826: *Higginson* above]. The Recorder's definition, from Webster is somewhat vague, but would be correct if the element of keeping open house is present and there is added "being so conducted as to violate law and good order." On the evidence before them the jury were bound to convict on any reasonable definition. The argument that unless the house is open to the public at large its disorderliness is not indictable is refuted by *Rogier*, 2 D. & R. 431: 1823, cited by Hawkins J.

(*a*) Cf. *per* L. Dunedin, *H.M. Advocate* v. *Brown*, 1907, S.C. (J.) (9 F.) at 77. "Courts of law are bound to follow, so far as they can, the discoveries of science and the results of experience."

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in *Jenks* v. *Turpin*: those cases referred to gaming houses, but the decisions equally apply to the practices here in question. About the photographs no point arises: what was done was done with the consent of the appellants. The letters are covered by the principle in *A. Thompson's* case [above]: they are, in effect, marks of identity. The gist of the indictment was that the accused were lewd and immoral persons assembled for the purpose of unnatural practices.

Appeals dismissed.

H. J.

Solicitor for the Appellants—*Percy Robinson & Co.*

Solicitor for the Respondents—*Wontner & Sons.*

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SWIFT AND MR. JUSTICE TALBOT.

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4 *April*.

WILLIAM HENRY WOODHOUSE.

Severity of sentence.

Appeal against sentence by leave of the Court, which, on March 28th, refused leave to appeal against conviction.

Appellant was convicted, on February 25th, at Derby Assizes, of perjury, and was sentenced by Branson J. to three years' penal servitude.

Sandlands for the appellant, who was not present. On January 15th, at Chesterfield Petty Sessions, appellant, who was a headmaster, was convicted with one Ashley, his assistant master, of poaching, and each was fined twenty shillings. Ashley on that occasion swore in evidence that he knew nothing about a gun produced by the police, and appellant said that he had never seen it before. On this perjury was assigned at

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WILLIAM HENRY WOODHOUSE.

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the trial, when Ashley pleaded guilty, and was sentenced to six months' imprisonment in the second division: he then gave evidence against the accused, and the judge eventually remitted that term and bound him over. The appellant had admittedly borne the highest character hitherto: he had a good record as a schoolmaster, and had served successfully in several public offices. He was now, at the age of forty-nine, irretrievably ruined: he had lost employment, his pension and his retiring allowance, and could never hope for professional employment again. It is submitted that the sentence in the circumstances is too severe.

AVORY J.: It must not be supposed that this Court does not regard perjury as a very grave offence. In this case appellant had actually dissuaded his co-defendant from pleading guilty at Petty Sessions, and had suborned him to commit perjury there: moreover, at the trial he had repeated his false evidence in the witness-box, and had suggested that Ashley had sworn falsely. But the Court cannot ignore the fact that beside his sentence his punishment would be very severe, and loath as it is to interfere with sentences, in all the circumstances of this case the sentence would be reduced to a term of eighteen months' imprisonment in the second division.

Sentence reduced.

H. J.

Solicitor for the Appellant—*A. Neal & Co., Sheffield.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE SALTER.

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11 *April.*

A. M. CAIRNS.

The Court will not hear objections on grounds not duly set forth in the notice of appeal.

Applicant was convicted of murder at Leeds Assizes on March 27th, 1927, and sentenced by Fraser J. to death.

At a previous trial at Newcastle Assizes on February 25th, 1927, the jury disagreed.

O. Peake for the applicant, who was present.

G. F. L. Mortimer, K.C., and *Alan Bell* (who were not called upon) for the Crown.

In the course of his argument *Peake* asked leave to add misdirection to the grounds of appeal, though it was not mentioned in the notice. The Court granted leave as it was a capital case.

The LORD CHIEF JUSTICE (at the conclusion of judgment) cited the statement of the Court in *Wyman*, 13 Cr. App. R. 165: 1918: *per* Darling J.: "The Court wishes it to be understood that in future substantial particulars of misdirection, or of other objections to the summing up, must always be set out in the notice of appeal, or sent to the Registrar of the Court of Criminal Appeal with the notice of appeal, even if the transcript of the shorthand note of the trial has not then been obtained. Such particulars must not be kept back until within a few days of the hearing of the appeal. If counsel has a genuine grievance regarding a summing up, he knows substantially what it is as soon as the summing up is finished, and can certainly specify his general

objection when he settles the notice of appeal." This direction the Court has repeated in later cases. In future it will act upon it.

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A. M. Cairns.

Hewart L.C.J.

Application dismissed.

H. J.

Solicitor for Applicant—*G. W. Steel Mason,* Newcastle-on-Tyne.

Solicitor for the Crown—*T. H. Smirk,* Newcastle-on-Tyne.

WILLIAM KNIGHTON.

Procedure on reference of a capital case on fresh evidence.

Reference by the Home Secretary.

Appellant was convicted at Derby Assizes on February 26th, 1927, of the murder of his mother on February 8th, and was sentenced to death by Branson J. He applied for leave to appeal on March 21st, when the application was heard and dismissed: the ground alleged was insanity. The Home Secretary had appointed experts to investigate appellant's state of mind (who found that he was sane), but the reference was solely in respect of certain statements made since the appeal which purported to disclose fresh facts.

Sir H. Maddocks, K.C., and *T. R. F. Butler* for the appellant, who was present.

The Court directed counsel to confine their observations to the new matter.

Maurice Healy for the Crown.

The Lord Chief Justice: This hearing takes place under s. 19 (a) of the Criminal Appeal Act, 1907, which provides: "Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State, on the consideration of any petition for the exercise of His Majesty's mercy, having reference to the con-

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viction of a person on indictment or to the sentence (other than sentence of death), may, if he thinks fit, at any time either:—

"(a) Refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted; or

"(b) If he desires the assistance of the Court of Criminal Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court of Criminal Appeal for their opinion thereon, and the Court shall consider the point so referred, and furnish the Secretary of State with their opinion thereon accordingly."

The first alternative seems to contemplate a case where there has been no appeal to this Court. In the circumstances we hear this case as if it were an appeal in which leave had been given to offer fresh evidence.

Maddocks, K.C., called and examined *Doris Knighton*, sister of the appellant. She gave evidence tending to show that someone other than appellant was guilty of the murder, and incidentally charging that person with other grave crime.

Cross-examined by *Maurice Healy* she admitted that she was "not sure" of the identity of the person she accused.

The LORD CHIEF JUSTICE: We are unanimous that this witness has deliberately given false evidence in her amended statements here—differing from her evidence before the coroner, the justices and at the trial—otherwise we should give the person she has accused an opportunity of denying her charges on oath. The confession made by appellant on the morning of the murder, when he was calm, sober and explicit, stands uncontradicted.

Appeal dismissed.

H. J.

Solicitors for Appellant—*Flint, Marsden and Bishop*, Derby.

A. J. S. CHESSHIRE, J. LUCAS AND E. BOTTOM.

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Hewart L.C.J.
Sankey J.
Salter J.

On the trial of an indictment for corruptly giving or receiving a gift, a paper found on a defendant which may refer to the bribery charged is admissible in evidence against him.

Appeals against conviction.

Appellants, Chesshire and Lucas, were convicted, after a three days' trial, on March 12th at the Lewes Assizes, of corruptly accepting a gift, and Bottom of making it, and were each sentenced by Horridge J. to six months' imprisonment with hard labour. At a previous trial on December 9th, 10th and 11th, before Avory J., the jury disagreed: they were released on their own recognisances.

Sir H. Maddocks, K.C., and *G. L. Hardy* for Bottom; *J. D. Cassels, K.C.*, and *St. John Hutchinson* for the other appellants; they were all present.

J. Flowers and *Eric Neve* for the respondents, the West Sussex Police.

Maddocks, K.C.: It was alleged that on July 28th, at Goodwood Races, Bottom, who was a "bookmaker's financier," gave a coin to each of the other appellants, who were then members of the Metropolitan Police and in uniform, in order to secure their protection in case he was in any way suspected. He was, in fact, arrested for "frequenting to commit a felony," *i.e.*, as a suspected pickpocket, but was discharged by the Chichester magistrates on July 31st. The prosecution alleged that on his arrest he said: "Fetch the Sergeant—where are the two Metropolitan constables? —they know I'm all right"; but of the four West Sussex policemen who were on duty in plain clothes only one heard the words, "where are the two Metropolitan constables?" and appellant denied saying so. It was also alleged that one of the constables came up when Bottom was arrested and said "He's all right—we know him," but the witnesses were not agreed which one said it. When he was arrested there was found on him a paper which greatly affected the trial. It contained various names and items with sums of money marked against each: among

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the entries, "Sergeant 5*s.*: Busy 5*s.*: 3 flattys 7*s.* 6*d.*: Extra flatty 2*s.*: Private flatty 2*s.* 6*d.*," alleged by the prosecution to be well-known racing slang for detectives and policemen. There were other words such as "poke" (meaning stolen wallet), which the police witnesses for the prosecution said were "used by the criminal classes." The defence was that in fact no payment of any sort was made to the two appellants, and that the paper was Bottom's ordinary account of his ordinary expenses at a race meeting a few days before, which he had always to render to a partner, and which in this instance, contrary to his usual habit, he had not torn up at the end of the day. It was clear and common ground that he had not written it after his arrest, for four hours before he had been under close observation: moreover, every item in the paper was compatible with his explanation. And throughout the trial it had been accepted that this paper was written before he came on the course, and the learned judge assumed it in his charge to the jury. Yet he told them that if they believed that the document referred to previous bribing of policemen and others, it was admissible in evidence and they might take it into account: he failed to point out that, even if the paper did refer to past payments or any payments, there was no evidence that they were corrupt payments in the statutory or any sense. At both trials appellant swore—and so did the constables—that he had not given these two constables anything at all.

[The Lord Chief Justice: Even if the learned judge made the assumption that the payment was corrupt, the document was before the jury, and it was open to them to conclude that it referred to that, and not to any previous day.]

But they had no right to speculate upon it without evidence: and if they had a doubt, they ought to have given the accused the benefit of it, and they ought to have been so directed. Suppose a juror had actually seen the transaction, he would not be entitled to use it in the jury's deliberations: it must be duly sworn in evidence and cross-examined to.

26 *April.*

At the adjourned hearing on April 26th the Court decided to re-hear the appeal with five judges.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY, MR. JUSTICE SALTER, MR. JUSTICE SWIFT AND MR. JUSTICE ACTON.

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A. J. S. CHESSHIRE, J. LUCAS AND E. BOTTOM.

Sir Henry Maddocks, K.C., repeated his previous argument. He did not object to the evidence of the paper being found on Bottom being given but to the contents thereof being read out, and as this was objected to it ought not to have been opened by counsel for the Crown. In *A. Thompson*, 1918, A. C. 221; 87 L. J. K. B. 478; 82 J. P. 145; 34 T. L. R. 214; 13 Cr. A. R. 61; 12 Cr. A. R. 261, the powder-puffs were admissible in evidence merely as marks of identity, not as relevant to the charge in issue: not everything found on a man charged is relevant to the charge.

[THE LORD CHIEF JUSTICE: Lord Atkinson says there: "If a document be found either on the person of or in the room occupied by an accused person bearing directly on the crime charged against him, but undated, it might be urged that is so old as to show nothing about his character at the moment." All that may be perfectly true, but that possibility goes, I think, to the weight of the evidence, not to its admissibility."]

Here there was no issue of identity. There was nothing to connect this paper with the facts of July 28th.

[THE LORD CHIEF JUSTICE: Not if it refers to bribes of the police on an earlier date?]

No: it merely goes to show bad character, which you cannot do: you might as well put in a previous conviction. That it was admissible on the ground of "system" is answered by *J. Bond*, 1906, 2 K. B. 389; 95 L. T. R. 296; 70 J. P. 424; 22 T. L. R. 633; 76 L. J. K. B. 693; 54 W. R. 586; 21 Cox C. C. 252: the jury were not invited to consider that some of the Metropolitan Police said they had not heard what other police officers swore they had heard.

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Then, there is not a tittle of evidence to show that if there was a payment on a previous occasion it was corrupt; the Crown ought not to have opened evidence of which the admissibility was doubtful. This paper alone—to say nothing of the remarks of the learned judge about "the criminal classes"—introduced so much prejudice that it was impossible for Bottom to have a fair trial. "Nothing," said Kennedy J. in *Bond*, 1906, 2 K. B. 398, "can so certainly be counted upon to make a prejudice against an accused . . . as the disclosure to the jury of other misconduct of a kind similar to that then charged. Therefore if, as is plain, we have to recognise the existence of certain circumstances in which justice cannot be attained at the trial, in short a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases and in seeing that the general rule . . . is not broken or frittered away by the creation of novel or anomalous exceptions."

And (*ibid.* p. 417) Bray J. says "the greatest care ought to be taken to reject such evidence [of a previous similar offence] unless it is plainly necessary to prove something which is really in issue." Here all the prosecution had to prove was that the money passed, and even if the paper was technically admissible it was unfair and prejudicial in the sense of the above *dicta*. It was not contested that the payment, if made, was not innocent. The various and innocent interpretations of the document were not put to the jury.

Counsel also cited the judgment of the Lord Chief Justice in *Armstrong*, 1922, 2 K. B. 555; 91 L. J. K. B. 904; 127 L. T. R. 221; 36 J. P. 209; 66 S. J. 540; 38 T. L. R. 631; 27 Cox C. C. 232; 16 Cr. A. R. 149.

Cassels, K.C., for the other two appellants: Corruption was an issue from the start to the finish of the trial. In no circumstances could the paper found on Bottom be evidence against these two appellants; but the learned judge in one passage in the summing-up told the jury that "until" they were satisfied that money passed, they could not consider the paper as evidence against them—as if, if they were so satisfied, it became evidence against them: the admission of the document was fatal to them. It was not pointed out to them that there might be a corrupt giver but an innocent receiver. The offence charged was a purely statutory one under the Prevention of Corruption Act, 1906, and

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if evidence of previous similar acts was admissible, the statute would have said so, as some statutes do. Counsel adopted the argument and citations of *Maddocks*, so far as they related to his clients. The sentence was very severe on two constables of long, meritorious service.

J. Flowers. The admissibility of the paper was not objected to before the justices, nor at the first trial, and had I known—I could not possibly know—that it would be questioned at the second trial, I would not have opened it. But it went to the essence of the crime.

[SALTER J.: In *Thompson*, Lord Dunedin says "the law of evidence in criminal cases is really nothing more than a set of practical rules which experience has shown to be best fitted to elicit the truth about guilt without causing undue prejudice to the prisoner." In a criminal trial it is not enough if the evidence is legally admissible: it must be both legal and fair.]

But that cannot apply to evidence of the gist of the crime.

(He was stopped by the Court.)

The LORD CHIEF JUSTICE: The majority of the Court think that the paper was properly admitted in evidence. No new rule is applied. In this case corruption was one of the issues throughout, and the paper in question went directly to prove corruption. In *A. Thompson* the evidence of the powder-puffs was merely collateral; but here the paper had to do with the gist of the case. The defence was that there was no payment, *i.e.*, no corrupt act, and if there was, it was an innocent payment. The appeal is dismissed, but the time during which appellants were under special treatment by virtue of sect. 14 of the Criminal Appeal Act, will run for the purposes of sentence.

Appeals dismissed.

Solicitors for Appellant Bottom—*Marris and Shepherd.*
Solicitors for the other Appellants—*Percy Robinson & Co.*
Solicitor for the Respondents—*J. E. Dell, Shoreham.*

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SHEARMAN.

THOMAS WHITWELL.

Application treated as final appeal for the purpose of sentence. Sentence reduced as a first offender.

9 *May.*

Application for leave to appeal against conviction and sentence.

Applicant was convicted of fraudulent conversion on April 6th, 1927, at the Essex Sessions (Chelmsford), and was sentenced by the Chairman to six months' imprisonment with hard labour.

SHEARMAN J.: The conviction must stand, but as applicant is a first offender, sentence may be varied to the second division.

Sentence reduced.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SHEARMAN.

ALFRED ERNEST MORTER.

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2 *May.*

The true test in a charge under s. 20 (1) (iv) (a) of 6 & 7 Geo. 5, c. 50, the Larceny Act, 1916, is whether defendant had control of the property charged or not, in circumstances whereby he became entrusted.

Appeal against conviction and sentence.

Appellant was convicted at the Essex Sessions, on April 6th, 1927, of fraudulent conversion, and was sentenced by the Chairman to four months' imprisonment with hard labour.

G. G. Raphael for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The indictment charged in two counts offences within s. 20 (1) (iv) (a):—"Every person who . . . being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody, or apply, pay or deliver for any purpose or to any person the property, or any part thereof, or any proceeds thereof . . . shall be guilty of a misdemeanour." Appellant, being the managing director of a company, was given two signed blank cheques to buy respectively a typewriter and a motor car. He bought these things, but filled up each cheque with a figure greater than the purchase price and appropriated the surpluses.

It is submitted that in law the section (above) does not cover this dealing with the sum beyond the authorised expenditure, because there is no entrustment (though it may amount to larceny by a trick). *Sheaf*, 19 Cr. App. R. 46; 89 J. P. 207; 42 T. L. R. 57; 134 L. J. 127; 28 Cox, C. C. 86: 1925: c.q.; *Donald Smith*, 1924, 2 K. B. 194; 93 L. J. K. B. 1006; 131 L. T. 28; 27 Cox, C. C. 619; 88 J. P. 108; 69 S. J. 37; 18 Cr. App. R. 76.

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ALFRED ERNEST MASTER.

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[AVORY J.: In *Sheaf* this Court held that there was only a civil contract between the parties.]

This is a case of access to the banking account without entrustment, like *Bakewell*, 2 Russell on Crimes, 1335 (k); R. & R. 35; 2 Leach, 943: 1802: convictions for embezzlement held bad.

[AVORY J.: Because it was not embezzlement.]

Further, the whole of the direction to the jury was occupied by the question of intent; the issue whether there was entrustment or not (or larceny) was not so much as mentioned.

[SHEARMAN J. referred to *F. E. Grubb*, 1915, 2 K. B. 683; 84 L. J. K. B. 1744; 113 L. T. 510; 79 J. P. 430; 25 Cox, C. C. 77; 59 S. J. 547; 31 T. L. R. 429; 11 Cr. App. R. 153. The test is—Is there any control of the property in question?] .

E. A. Hawke for the Crown was not called upon.

The LORD CHIEF JUSTICE cited from the written judgment of the five judges in *Grubb* (above, 11 Cr. App. R. at 157): "In the opinion of this Court a person may be entrusted with property, or may receive it for or on account of another person within the meaning of this section (s. 1 (1) of 1 Edw. 7, c. 10, the Larceny Act, 1901), notwithstanding that the property is not delivered to him directly by the owner, and that in fact the owner does not know of his existence, and has no intention of entrusting the property to him. If the accused has obtained or assumed the control of the property of another person in circumstances whereby he *becomes* entrusted, or whereby his receipt *becomes* a receipt for or on account of another person, and fraudulently converts it or the proceeds, then he has committed an offence within the section." It is true that the Chairman does not use the word "entrusted" in his summing up, but he uses equivalent words. Sentence may run from the date of conviction.

Appeal dismissed.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE SALTER.

HENRY LEONARD PORTER.

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16 *May.*

When the issue is identity of the accused, especial care is needed in the charge to the jury; there ought to be a direction to them on his silence, if and when he hears a prejudicial statement.

After notice of appeal, supplementary grounds should only be presented the Court if they disclose new matter.

Appeal against conviction and sentence.

Appellant was convicted on April 5th, 1927, at the Hertfordshire (St. Albans) Sessions (with one Walters), of housebreaking, and with Walters and a woman of stealing from the house goods to the value of a hundred pounds, and was sentenced by the learned Deputy-Chairman, His Honour Judge J. Sturges, K.C., to six months' imprisonment with hard labour. The woman was convicted of knowingly receiving. (See p. 69, below.)

R. E. Seaton for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. A house at Rickmansworth was broken into, and property stolen therefrom (including coat hangers) was conveyed by two men in a trunk by railway, and put on a taxi-cab at Marylebone Station driven by one Lucas. The grounds of appeal are misdirection (i) on identification; (ii) on admissibility of evidence against appellant of statements made by fellow prisoner in appellant's presence; (iii) the case for appellant was not fully placed before the jury.

As regards identification, three witnesses were called to identify appellant. Two of these, Wells and Burgess, identified Walters, but failed to pick out appellant. The Deputy-Chairman in his summing-up directed the jury that appellant was identified by Burgess—this was wrong. As regards Wells and Burgess, the

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Deputy Chairman told the jury that both said they saw the male prisoners carrying a box to Rickmansworth Station. He should have told them that these two witnesses saw "two men carrying a box," in view of the fact that neither witness was able to pick out appellant. As regards the third witness, Lucas, the taxi-driver, he picked out appellant a week later. It is submitted that his identification was very slender, because (a) he admits that he said at the Police Court, "I picked out Porter as one of the two men who hired me that day. I say so to the best of my recollection." (b) He says Walters was the person who hired him and paid him, and therefore the person he would be most likely to identify if he were able to identify anybody. (c) At the Police Court Lucas was asked to pick somebody out, and picked out three persons, not one of whom was either Walters or appellant. The Deputy-Chairman failed properly to caution the jury about convicting upon this evidence.

When the two male prisoners went with a police officer to the female prisoner's house at Brixton, on the door being opened she said, "Get away, the 'tecs are here." The Deputy-Chairman in the summing-up used the words, "Get away quickly, the 'tecs are here"—the word "quickly" might indicate an urgency of exit, whereas the original words sworn to in evidence may have been quite normal words, likely to be used by her to any caller in the circumstances. The Deputy-Chairman goes on, "Why did she say it, and why did the men go away?" Here again is a misdirection, as the two male prisoners were already with Detective Constable Howard, and though they were two to one, made no attempt to act upon her suggestion. The Deputy-Chairman invited the jury to consider the statements, "Get away, the 'tecs are here," and "The swine have got us: they have found the coat hangers," as being evidence in themselves against the appellant. In doing so he was wrong, he should have told the jury that they were only entitled to consider the demeanour of the appellant on hearing the statements as evidence against him, and not the statements themselves. *S. Norton,* 1910, 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 54 S. J. 60; 26 T. L. R. 550; 5 Cr. App. R. 765: c. q.; *Christie,* 1914, A. C. 545; 83 L. J. K. B. 1097; 24 Cox, C. C. 249; 111 L. T. 220; 78 J. P. 321; 58 S. J. 515; 30 T. L. R. 471; 10 Cr. App. R. 141: c. q.

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[He was stopped by the Court.]

Tindal Atkinson for the Crown. (1) On the question of identity. While it is admitted that the learned Deputy-Chairman was in some error in describing the evidence on identity, the whole question had been so carefully discussed during the hearing that the jury could not have been misled.

(2) On the admissibility of the statements made by the female defendant. These statements were evidence not only in relation to the demeanour of the two other prisoners, but also as tending to show that the three prisoners, who were jointly charged with receiving the stolen property, were acting in concert and for a common purpose. There was no logical distinction between the present case and a case of conspiracy, in which the evidence of statements made by one conspirator relating to the common purpose of the conspiracy is evidence against his co-conspirators, whether as proving the existence of or a participation in the conspiracy. *Jessopp*, 16 Cox, C. C. 204: 1877, where in the case of a mutual agreement of suicide by two persons, evidence of statements made by the deceased when purchasing poison in the absence of the prisoner (the survivor) was admitted. The prosecution in the present case did not rely on the statements as proving the truth of the facts stated in them, but only as basing an inference that the three prisoners had been jointly concerned in dealing with the stolen property. In any case, the statements were admissible as affording a comment that neither of the male prisoners offered any observation thereon by way of explanation or reply. In these circumstances no miscarriage of justice had occurred.

[The LORD CHIEF JUSTICE: What common design was furthered here by appellant's conduct? The property had already been stolen.]

Tindal Atkinson. It is evidence of participation in some joint dealing with the property.

The LORD CHIEF JUSTICE: The female defendant, who was convicted of receiving knowingly, and Walters, a co-defendant, do not appeal. Both Wells and Burgess failed to identify the

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HENRY LEONARD PORTER.

Hewart L.C.J.

appellant. Lucas, the driver, who saw him only at Marylebone Station, did pick out appellant, but not Walters, and at the trial he recognised both. Moreover, appellant set up an *alibi*, and swore that he had never been in Rickmansworth in his life. There was, therefore, a gap in the evidence, and the Court is not entitled to guess what it is. There were, however, other elements which, if properly dealt with, might well have filled that gap against appellant. But it was wrong to leave the jury to draw an inference from his silence to supplement defects in the identification, as if it were substantive evidence against him. A jury ought not to be allowed to be satisfied on such evidence. The Court quashes the conviction.

Conviction quashed.

The LORD CHIEF JUSTICE: In this case, after leave to appeal had been given by the learned judge, appellant sent the Court an additional statement not containing any fresh matter whatever. This practice has often been condemned by the Court, *e.g.*, in *J. Piggott*, 15 Cr. App. R. 35: 1920; *W. E. Simpkins*, 17 Cr. App. R. 1: 1922; and *A. E. Young*, *ib.* 131: 1923. Such a proceeding entails additional trouble on officials, may easily lead to a delay in hearing, and may obscure the really important matter.

H. J.

BEFORE

MR. JUSTICE SWIFT, MR. JUSTICE TALBOT, AND MR. JUSTICE MACKINNON.

30 *May.*

CHARLES HENRY STEWART STANLEY.

By virtue of s. 30 of 8 Edw. VII. c. 67, the Children Act, as amended by s. 28 (2) of 4 & 5 Geo. V. c. 58, the Criminal Justice Administration Act, corroboration of the unsworn evidence of a child must be "material evidence implicating the accused."

Appellant was convicted, at the Lancashire (Salford Hundred) Sessions, on April 20th, of indecent assault on a girl five years

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old (and pleaded guilty to obtaining money by false pretences), and was sentenced by the learned Chairman to three years' penal servitude for the latter offence, and, concurrently, twelve months' imprisonment with hard labour for the former. He appealed by leave of the Court against that conviction.

Appellant was not present and was not represented, but—

P. E. Brierley, for the Crown, stated the facts to the Court. Appellant lodged in the house of the girl's parents, and the child's unsworn evidence was that, being left alone with her for fifteen minutes, he interfered with her. The corroboration tendered by the prosecution was the mother's evidence that on her arrival immediately after the alleged offence he seemed to be "flurried," and the child said: "Do you know what this man has done to me?" When appellant interrupted by saying "I promised you a scooter," it was suggested that the child was beginning a complaint (which she completed in full three hours later). About an hour later he disappeared from the house, because, he said, he had ransacked the drawers in the kitchen for money in the presence of the child, and had borrowed ten shillings from the woman, which he could not pay (nor the sum he owed her for board, &c.). The mother noticed the child's slightly scratched and inflamed condition, but a doctor deposed that this might be due to threadworms, and it was not relied upon as corroboration. Defendant in evidence admitted that he had taken the child up and "pretended to smack her" because she taxed him with ransacking the drawers, and that the child's reference to them was mistaken by the mother as referring to her clothing.

The Court had no doubt that the corroboration required by the statute was not forthcoming here, and that the case should not have been left to the jury.

Conviction quashed.

H. J.

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Swift J.
Talbot J.
MacKinnon J.

HERBERT GEORGE ARNWAY READE.

Inadequacy of sentence.

Appeal by leave of the Court against sentence of six months' imprisonment with hard labour, after conviction at the Grimsby Borough Sessions on April 12th, for receiving property, knowing it to have been stolen. The Court in granting leave (but refusing it in respect of conviction) warned appellant that the term of his sentence might be increased.

Appellant in person.

Walker Carter for the respondents, the Grimsby police.

SWIFT J.: Appellant, despite the express warning of this Court, has persisted in this appeal. He was convicted on conclusive evidence of tempting two youths by inciting them to steal stores and provisions from ships in the docks, and himself teaching them how to do so. The sentence was quite inadequate, and the term would be increased to eighteen months.

Sentence increased.

H. J.

Solicitor for Respondents—*The Town Clerk,* Grimsby.

HENRY CADWELL.

The machinery of 5 Geo. 4, c. 83, the Vagrancy Act, 1824, must not be used merely because a crime is suspected, but the legal evidence to establish it fails.

Appellant was convicted, on March 21st, and sentenced as an incorrigible rogue, at Burnley Borough Sessions, on April 29th, to twelve months' imprisonment with hard labour. He appealed against sentence.

H. Broadbent for the respondents. He is a reputed thief, but it must be admitted that in this instance the charge was made

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HENRY CADWELL.

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because it was thought that there was not sufficient evidence of the larceny of which he was suspected.

The Court referred to *A. Harrison*, 9 Cr. App. R. 145: 1913: sentence reduced.

TALBOT J.: The Vagrancy Act of 1824 was not intended as a convenient method for supplying a hiatus in the evidence of felony. In *F. Dean*, 18 Cr. App. R. 133: 1924, the Lord Chief Justice made remarks to this effect, and the Court reduced the sentence to one day's imprisonment. We, fortified by counsel's view, do the same now.

Sentence reduced.

H. J.

Solicitors for Respondents—*The Town Clerk of Burnley.*

FREDERICK WHITE AND GEORGE SHELTON.

On the trial of an allegation of being a habitual criminal, the interval between the last two convictions is only one of several elements to be considered by the jury: others are accused's silence on his life during that interval, the nature of the crime, and the possession of housebreaking instruments and their number and character at the time of arrest.

Appeals against sentences as habitual criminals.

Appellants, who were present, pleaded guilty, at the Central Criminal Court, on May 3rd, to warehouse breaking, and were convicted as habitual criminals; they were each sentenced, on May 4th, by the Commissioner, to three years' penal servitude and five years' preventive detention. They were tried by separate juries.

J. H. Bowman for White: *M. Garsia* for Shelton.

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Anthony Hawke for the Crown.

The facts sufficiently appear from the judgment. Counsel referred to *E. Turner*, 1910, 1 K. B. 346; 79 L. J. K. B. 176; 102 L. T. 367; 74 J. P. 81; 22 Cox, C. C. 310; 54 S. J. 164; 26 T. L. R. 162; 3 Cr. App. R. 103: c.q.; *J. Kelly*, 74 J. P. 167; 26 T. L. R. 196; 3 Cr. App. R. 248: 1909: c.q.; *I. Baggott*, 74 J. P. 213; 26 T. L. R. 266; 4 Cr. App. R. 67: 1910: c.q.; *Keane and Watson*, 8 Cr. App. R. 12: 1912; *A. Brown*, 109 L. T. 749; 78 J. P. 79; 23 Cox, C. C. 615; 58 S. J. 69; 30 T. L. R. 40; 9 Cr. App. R. 161: 1913: c.q.; *J. Young*, 109 L. T. 753; 78 J. P. 80; 23 Cox, C. C. 624; 58 S. J. 100; 30 T. L. R. 69; 9 Cr. App. R. 185: 1913: c.q.; *Hammersley*, 26 Cox, C. C. 552; 36 T. L. R. 96; 122 L. T. 383; 84 J. P. 23; 14 Cr. App. R. 118: 1919: c.q.; *G. Vincent*, 15 Cr. App. R. 19: 1920: c.q.; *G. Clarke*, 17 Cr. App. R. 90: 1923: c.q.; and the Court referred to *C. L. Norman*, 1924, 2 K. B. 315; 93 L. J. K. B. 883; 131 L. T. 29; 27 Cox, C. C. 621; 88 J. P. 125; 68 S. J. 814; 40 T. L. R. 693; 18 Cr. App. R. 81: c.q.

MACKINNON J. (*a*): These two appellants were charged together, at the Central Criminal Court, on an indictment charging them first with housebreaking, and, secondly, with being found by night in possession of housebreaking implements. They at first both pleaded guilty; but one of them subsequently withdrew his plea and was allowed to plead not guilty. They were subsequently tried separately on a further charge of being habitual criminals. Each of them was convicted by the jury on that charge. Each of them was sentenced to the same sentence, three years' penal servitude and five years' preventive detention. Each appeals against his sentence and for leave to appeal against his conviction as an habitual criminal.

The circumstances of the particular offence which brought them to trial were these. About midnight on the 2nd April of this year a policeman heard a noise in a building in Greville Street; he obtained the assistance of other police, and they entered the

(*a*) This judgment is printed from a verbatim transcript supplied by the courtesy of the Director of Public Prosecutions.

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FREDERICK WHITE AND GEORGE SHELTON.

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building. They went to the premises of some people called Messrs. Curwen on the third floor; the door of those premises had been drilled by a brace and bit, the lock had been cut round and by this means an entry had been obtained. Inside the premises the police found the two appellants. There was a safe in the room which was lying on its face; the back of it had been sawn through and forced open, an operation that needed the use of a very elaborate set of safebreaking tools. On the floor near the safe there was a suitcase containing a quantity of watches and jewellery which the night before had been safely locked up in the safe, and there were other safes in the room which contained valuable property which had not up to then been attacked by the prisoners. The elaborate set of housebreaking implements mentioned was in a case on the floor, and consisted of two steel jemmies, three steel bits, two braces, skeleton keys, and a circular metal cutting tool with four cutters: it was described by the Detective Officer who gave evidence of what they found there as in every respect an up to date set of safebreaking implements.

That was the nature of the offence to which they both at first pleaded guilty; the second of them withdrew his plea, because he wanted to get another jury, on the second charge; but there was no question that they were both there and were both concerned in this offence.

It is necessary to mention those facts with regard to the primary offence with which they were both concerned, because they are highly material with regard to the subsequent charge with which this Court is now concerned, namely, the charge of being a habitual criminal, that is to say, of being so on the 2nd April, 1927, when this offence was committed. We have heard counsel separately for the two appellants, and what they have urged I must deal with separately. Counsel, for White, has suggested first that there was no sufficient evidence on which the jury should have been allowed to hold that in fact this man White was a habitual criminal. He has relied upon a proposition for which authority is hardly necessary, namely, that it must be proved to the satisfaction of the jury that the offender has been leading a dishonest or criminal life before and up to the date of the offence with which he is now charged. In particular, he said there was no sufficient evidence because previously to this par-

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ticular offence and since his last conviction there was no express evidence of his leading a dishonest life. One must bear in mind some other matters with regard to that. First of all, as was said in the case of *The King* v. *J. Heard*, reported in 7 Cr. App. R. 80: 1911 [and 106 L. T. 304; 76 J. P. 232; 22 Cox, C. C. 725; 28 T. L. R. 154], in regard to evidence of this sort, "That evidence may take many forms, such as association with criminals, the possession of funds too great to be due to the prisoner's own earnings or to the charity of others, the character of the crime, either where it is similar to the prisoner's former crimes or is only possible after careful preparation. Where the interval between the last known fact against the prisoner and the commission of the substantive crime is considerable—and six or nine months is a considerable interval—there should be additional evidence. In this case there was such evidence, for the crime was carefully planned, was committed in association with another habitual criminal, and was carried out with skill, so the jury, with the facts before them, were justified in convicting and needed no further direction." Very similar reasoning was applied by this Court in the case of *The King* v. *Keane and Watson*, reported in 8 Cr. App. R. 12.

Fourteen months had elapsed in this case since White's last previous conviction. There was no positive evidence of any criminal acts by him during that period, but he refused to give any account of what he had been doing when asked, and one must look at the nature of the crime itself: the elaborate character of the tools (*a*) with which it was committed, the fact that it was done in association with this other man Shelton, the fact that it was a similar offence to the many previous cases of a like nature with which they had both been associated over many years and had been convicted of on many occasions—White himself having, on his last conviction but one, been sentenced to five years' penal

(*a*) The particulars of dishonest or criminal life in the statutory notice to the accused, after the usual forms, which state in each case the interval since the last release from prison, added: "the circumstances in which you were on the night of the 2nd/3rd day of April, 1927, arrested prove that you had then resumed your dishonest and criminal life, inasmuch as . . .": the association of the two prisoners and the circumstances of their arrest were set out, and the conclusion was "and further that there were then found in your possession the following implements of housebreaking" (complete list set out).

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servitude for an offence involving the possession of dynamite and blowing open a safe. All this was clearly evidence on which the jury was entitled to find, and upon which it is not surprising they did find, that this charge was made out.

The second ground of appeal urged by counsel on behalf of White is a criticism of the summing-up of the learned Commissioner. He suggested that he did not specially bring before the jury the fact that there was no express evidence that during the previous fourteen months he had not lived an honest life. That criticism appears to be quite without substance; indeed, as it seems to us, the learned Commissioner clearly pointed out the lapse of fourteen months and he used the phrase: "He has been living for a long time an honest life," in reference to that period. There seems to be no question whatever about that. It is suggested that he did not bring before them the fact that between his last and his penultimate conviction (the first sentence being five years' penal servitude and the second three years' penal servitude) there was a gap of two years. That seems to be an unimportant matter. There was evidence elicited by White's own counsel in cross-examination that during that period he was the associate of thieves. These criticisms are undoubtedly without any substance and form no ground of appeal.

As regards the sentence, this Court sees no reason whatever to think that it was in any way inappropriate.

As regards Shelton, counsel has urged very much the same sort of points; indeed, the only difference between the two cases is that in the case of Shelton the period since his last conviction up to their discovery in this warehouse on the 2nd April, 1927, is longer, for it amounts to two years and eight months, instead of something over one year. The reasons that I have referred to in regard to the inference to be drawn from, and the evidence furnished by, the nature of the crime, the obvious care and time that its planning and its execution required, the association with a similar criminal and the similarity of their joint efforts in the offences of which they had previously been so often convicted—all those are elements which afford in this case, as in White's case, abundant evidence on which the jury were entitled to come to the conclusion which they did.

The criticisms on the summing-up of the learned Commissioner

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are similar in this case, but, we think, are equally unfounded. So also is the suggested objection to the sentence.

The appeal in both these cases must be dismissed.

Appeals dismissed.

Solicitors for both Appellants—*Lumley, Taunton and Lumley.*

H. J.

JOSEPH DAVIDSON.

The Court will of its own motion call attention to a defect in the summing up, in a proper case.

When the evidence on the facts is in direct conflict the jury should be directed that if they are in doubt which version of the facts to accept they should acquit.

Observations on the granting of bail by the judge at the trial and on the relation of his opinion of the verdict to the appeal.

Appeal on certificate.

Appellant was convicted, at the Liverpool Assizes, on April 29th, of fraudulent conversion and forgery, and was sentenced, by Branson J., to nine months' imprisonment in the second division. The learned judge had admitted him to bail, and he was present in Court in the ordinary way.

Singleton, K.C., and *N. B. Goldie* for the appellant.

Wooll for the respondents.

After *Singleton, K.C.*, had dealt at length with the facts of the case, and had contended that the verdict was unsatisfactory, and the learned judge was dissatisfied with it, as was shown by his granting a certificate and leave to appeal, the Court was of opinion that the jury, if properly directed, were within their right, as the issues rested solely on "word against word," in coming to the conclusion they did, and pointed out that though the notice of appeal expressly disclaimed any criticism of the learned judge's summing up, there were passages on which, they suggested, counsel might desire to comment. Accordingly *Singleton, K.C.*, asked leave to amend the notice, which was granted. He then argued that there was misdirection in those

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JOSEPH DAVIDSON.

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passages, which had implied that the *onus* was on defendant to disprove positively the charges, or failed to direct the jury, if they were in doubt, to acquit. The learned judge had expressed surprise at the verdict, and had granted bail.

He cited *Schrager*, 6 Cr. App. R. 254: 1911: c. q.; *J. R. Parker*, 6 Cr. App. R. 285: 1911: c. q.; *W. Hart*, 10 Cr. App. R. 176: 1914: c. q.; and *F. Rice*, 20 Cr. App. R. 21: 1927: c. q.

Wooll was asked to confine himself to the summing up. He cited *H. G. Moor*, 15 Cr. App. R. 31: 1920, to the effect that even the disagreement of the trial judge with the verdict was not a conclusive ground for quashing a conviction. The learned judge had in effect correctly directed that if the jury failed to believe the chief witness for the prosecution they should acquit, and they evidently had believed him, but it must be admitted that in one passage the summing-up seemed to lapse into inadequacy.

SWIFT J.: This Court has repeatedly laid it down that it will not grant bail to a prospective appellant except in very special circumstances: *The Duke of Leinster*, 17 Cr. App. R. 147: 1923. We are not aware of any special circumstances in this case. The learned judge did not say that he was dissatisfied with the verdict, but that "it came somewhat as a surprise," and he granted his certificate merely "to facilitate" an appeal to this Court. In any case, the judge's opinion was not conclusive of an appeal; it was one factor: *F. Rice*, 20 Cr. App. R. 21: 1927: c.q. But a full direction was not given to the jury: there was "a lapse into inadequacy" on the question of *onus*: they were not clearly told that if they were in doubt about the two diametrically opposite stories told they should acquit. Moreover, the sole issue being the intent to defraud, there should have been a full direction on this point: the jury might believe the prosecutor's story and yet negative this intent. Accordingly, the appeal must be allowed.

Conviction quashed.

H. J.

Solicitor for Appellant—*H. J. Davis*, Liverpool.

Solicitor for Respondents—*The Prosecuting Solicitor of Liverpool.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE SWIFT.

1927
20 *June.*

CHARLES HARDCASTLE LEE.

A jury trying a second or other charge against a defendant should be warned to disregard the evidence in the previous trial.

Appeal against conviction by leave of the Court.

Appellant was convicted of larceny at the Leeds Assizes on May 3rd, and was sentenced by Salter J. to fourteen months' imprisonment.

Kingsley Griffith, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. There were two counts in the indictment charging two unconnected larcenies, which were tried separately by order of the learned judge but by the same jury. On the former appellant was acquitted, and it is submitted that the conviction on the latter was due to the "cumulative effect of the evidence in the two cases"—as the Lord Chief Justice said in *W. Klein,* 19 Cr. App. R. 161: 1926, a very similar case in which the Court quashed the conviction on that ground. The learned judge in this case had omitted to warn the jury against allowing the first case to go to the credit of the second. The evidence in the second was weaker than in the first, for the chief witness failed to identify appellant in Court, *i.e.*, on oath, though it seemed that he had done so at the police parade, but the only evidence of this was appellant's own admission in the witness-box.

[He was stopped.]

Anthony Hawke for the Crown. The important moment for identification was the parade the day after the theft. Moreover, the *alibi* to which appellant swore was uncorroborated, though he deposed that three other persons were aware of it. The positive evidence against him was stronger than that in *Klein's* case.

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20 *June.*

CHARLES HARDCASTLE LEE.

Hewart L.C.J.

The LORD CHIEF JUSTICE: At the conclusion of the case for the Crown there was no evidence at all to connect this appellant with the larceny. The prosecution were not entitled to rely on an identification not on oath where that attempted on oath failed. Nor could they, in the circumstances, derive advantage from the fact that witnesses did not corroborate the *alibi*: the *onus* was still on the prosecution. The case is governed by *Klein*.

Conviction quashed.

H. J.

ALBERT FREDERICK WALTERS.

Observations by the Court on the desirability of an official shorthand report of its cases being taken.

See *H. L. Porter* above, p. 55.

This appellant, who was also sentenced to six months' imprisonment with hard labour, had been granted an extension of time for appealing in view of the above case.

R. E. Seaton, for appellant (under s. 10 of the Criminal Appeal Act), who was present.

Tindal Atkinson, for the Crown, was invited by the Court to distinguish between the two cases, and dealt with slight differences in the facts of identification of the two appellants, but the Court, though admitting that the circumstances were somewhat different, could not, taking the trial as a whole, discriminate between the two.

Conviction quashed.

THE LORD CHIEF JUSTICE, in giving judgment, referred to the grave inconvenience to the Court that there was not an official shorthand report of appeals (though by the courtesy of the Clerk of the Peace for Hertfordshire there was one of *Porter's case*). It was to be hoped that some day such a report would be available in all cases, if it was required.

H. J.

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4 *July.*

Hewart L.C.J.
Sankey J.
Swift J.

JOHN HENRY BARKER.

The Court of trial should assist an undefended prisoner in putting questions by way of cross-examination.

Appeal against conviction and sentence.

Appellant was convicted, on June 11th, at the Middlesex Sessions, of horse stealing, and was sentenced by the Deputy-Chairman to three years' penal servitude.

St. John Hutchinson for the appellant, who was present.

May, for the Crown, asked by the Court, admitted that he could not support the conviction.

The Lord Chief Justice: The procedure at the trial was remarkable. There was a course of dealing between the prosecutrix and appellant. He was in the habit of hiring a horse and cart from her, and from time to time exchanged horses for her. On this occasion he did so and got two pounds with the horse, which, with the money, he brought back to her. When the detective intervened the two horses were restored each to its former owner. Appellant was undefended, and when he was invited to question the witnesses he began to make a statement, and was told that he must do that later on. No help was given him in formulating questions. He was not invited to cross-examine the detective. When the case for the prosecution was closed he was told that he could give evidence, but when he proposed to ask the prosecutrix a question he was informed that he was too late—"he had missed his chance." In the summing-up the learned Deputy-Chairman omitted to tell the jury that a fraudulent intention was the essence of the crime charged. Yet the defence suggested was that there was no fraud on the appellant's part, as he had been exchanging horses for the prosecutrix for a long time. The learned Deputy-Chairman added: "There is no answer to the charge in this case—you can have no doubt about your verdict."

Conviction quashed.

H. J.

Solicitor for Appellant—*F. Freke Palmer.*

ALEXANDER EDWARD TAYLOR.

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4 *July.*

Hewart L.C.J.
Sankey J.
Swift J.

Observations by the Court on the classification of prisoners.

Appeal against sentence (by leave of Swift J.) and application for extension of time for appeal against conviction.

Appellant was convicted, at Bedford Assizes, on May 31st, of manslaughter (by reckless motor driving), and was sentenced, by Shearman J., to "twelve months' imprisonment."

Jowitt, K.C. (with him *C. L. Henderson*), for the appellant, who was present.

Eales for the Crown.

Jowitt, K.C. The application for extension of time is made that a point of law may be argued, viz.: whether evidence of reckless driving at a point more than five miles from the scene of the accident, which resulted in the deceased's death, was admissible to prove negligence at the time charged, having regard (1) to the distance which separated the two points, and (2) to the fact that there had been a break of a few minutes in the journey between the two points. That evidence had been admitted and had been fatal to the defendant, but the point was not taken below.

The Lord Chief Justice: That being so, the extension of time cannot be granted, and we are inclined to think that the point is not a good one. In another case the point had arisen, and it was held to be a matter of degree in each case. Even if the evidence was inadmissible before verdict it was certainly admissible after verdict, and might equally affect sentence.

Jowitt, K.C. On the question of sentence. Appellant is a man of good and meritorious character, an officer in the Air Force with an excellent record: yet the learned judge had refused to place him in the "second division."

The Lord Chief Justice: The classification of prisoners, we understand, has of late developed considerably, and the old Home Office memorandum on the subject is now belated. At any rate,

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prison authorities are fully alive to the necessity of keeping first offenders apart from old offenders. In the circumstances of this case a sentence in the second division is substituted.

Sentence varied to imprisonment in the second division.

H. J.

Solicitors for Appellant—*W. A. Guest & Co.*, Bedford.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SANKEY AND MR. JUSTICE SALTER.

11 *July.*

WILLIAM CHARLES RICHARD PECKHAM (THE YOUNGER).

When defendants are jointly charged with knowingly receiving stolen property, there must be a careful ruling about the possession of each.

Appeal against conviction and sentence by leave of the Court.

Appellant was convicted at the Dorset Sessions on April 6th, 1927, with his father, of stealing chickens, and was sentenced by the learned Chairman to eighteen months' imprisonment with hard labour.

G. Tomlin for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Both defendants were charged in two counts with both stealing and receiving. The Chairman never distinguished throughout between the two cases of the father and the son. The son was only a lodger in the father's house, though this fact did not come out at the trial. Hence the Chairman did not mention the difference in the evidence concerning the possession of the two defendants. He did point out that there was no evidence against either of stealing the

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WILLIAM CHARLES RICHARD PECKHAM (THE YOUNGER).

Avory J.
Sankey J.
Salter J.

chickens, but he directed the jury that if they were satisfied that the chickens were stolen (as they undoubtedly were), they could convict either or both of the defendants of knowingly receiving, "unless they convince you that they (or either) bought them not knowing that they were stolen." He added—as the elder defendant said that he had bought them from a man in the road whom he did not know—"It is extraordinary in a small place like this that such a man should not come forward when he finds two men wrongfully accused."

[He was stopped.]

J. J. Llewellin for the Crown. The summing-up was in the whole adequate. In *Abramovitch*, 84 L. J. K. B. 396; 59 S. J. 288; 31 T. L. R. 88; 11 Cr. App. R. at 49: 1914: c. q., Reading L.C.J., said: "We must not be too critical in dealing with the summing-up of a judge after a lengthy trial and speeches by counsel." Prosecuting counsel cited that case to the jury, and though one sentence of the Chairman tended to put the *onus* on the defendant, yet he added that the jury were entitled to find a man in possession of goods recently stolen guilty unless he could give a good account of that possession. The sentence "it is extraordinary, &c.," was cancelled by the next words, "but it may be he stole them himself." This appellant was himself the owner of the only other live stock on the premises. The jury saw and heard him, and were entitled to judge the truth of his story as a whole from the impression he made.

AVORY J.: There was no evidence in this case of stealing by the appellants. The only possible verdict was one of receiving, as the appellant's father either stole or bought the chickens. The learned Chairman made no distinction whatever between the possession of the two defendants; the only evidence of the son's possession was his own admission that he had assisted his father in making a chicken-run. In saying in effect that defendants must "prove their innocence," the Chairman misstated the *onus*.

Conviction quashed.

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The meaning of ambiguous words is for the jury to determine in the light of all the evidence before them.

Whether in law "attempt" and "endeavour" are synonymous, quære.

Appeals against conviction (Stuart's application for leave being treated as the appeal), and applications for leave to appeal against sentence.

Appellants were convicted, after a four days' trial, on May 24th, 1927, at the Central Criminal Court, of various forms of "blackmail," and of conspiracy to commit those crimes, and were sentenced by the Lord Chief Justice, Stuart to twelve years' penal servitude (threatening to accuse of crime), and (concurrently) to five years' penal servitude (demanding money with menaces), and two years' imprisonment with hard labour (conspiracy); Leonard and Tannen to ten, five and two years (concurrent) for the same offences respectively; Maples to fifteen, five and two (concurrent) for the same offences respectively, and that of uttering a threatening letter; and Taylor to penal servitude for life, five years' penal servitude, and two years' imprisonment with hard labour for the same offences respectively, as in the case of Maples.

The offences of some of the appellants were continuous for three years and a half, and they had received in all 10,754*l*. The indictment contained twenty-nine counts. The statutory offences charged were under s. 29 or s. 30 of 6 & 7 Geo. 5, c. 50, the Larceny Act, 1916, which run as follows:—

(1) Every person who (i) utters, knowing the contents thereof, any letter or writing demanding of any person with menaces and without any reasonable or probable cause, any property or valuable thing; (ii) utters, knowing the contents thereof, any letter or writing accusing or threatening to accuse any other person (whether living or dead) of any crime to which this section applies, with intent to extort or gain thereby any property or valuable thing from any person; (iii) with intent to extort or gain any property or valuable thing from any person, accuses or threatens to accuse either that person or any other person (whether living or dead) of any such crime . . . shall be guilty of felony, and on conviction thereof liable to penal servitude for life. . . .

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(2) Every person who with intent to defraud or injure any other person (a) by any unlawful violence to or restraint of the person of another, or (b) by accusing or threatening to accuse any person (whether living or dead) of any such crime or of any felony, compels or induces any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security . . . shall be guilty of felony. . . .

(3) This section applies to any crime punishable with death or penal servitude for not less than seven years, or any assault with intent to commit any rape, or any attempt to commit any rape, or any solicitation, persuasion, promise or threat offered or made to any person whereby to move or induce such person to commit or permit the abominable crime of buggery. . . .

(4) For the purposes of this Act it is immaterial whether any menaces or threats be of violence, injury or accusation to be caused or made by the offender or by any other person.

S. 30. Every person who with menaces or by force demands of any person anything capable of being stolen with intent to steal the same shall be guilty of felony, and on conviction thereof liable to penal servitude for any term not exceeding five years.

G. D. Roberts for all the appellants except Taylor (under s. 10 of the Criminal Appeal Act, 1907, except in respect of Tannen), who were present.

Lever for Taylor, who was present.

Roberts. The sole point of law is that the Lord Chief Justice failed to direct the jury that the evidence was compatible with a threat to accuse the prosecutor of gross indecency (or an attempt or solicitation thereto) with a male person—a crime which is not within sub-s. (3) of s. 29 (above). The evidence was that when Taylor first saw the prosecutor with Stuart he threatened to charge the former with "impropriety" with the latter, but that would include the lesser offence. Stuart said in cross-examination that he understood Taylor to mean the abominable crime, but what Stuart thought could alter the gravity of the offence. In the result it was guess-work by the jury what crime it was pretended to impute to the prosecutor. There was misdirection in so far as

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the learned judge had not left the two alternatives to the jury. The true question for them was: "Can the words ('impropriety,' 'improper conduct,' &c.) bear any other meaning?"

He cited *T. Hickman*, 1 Moody, C. C. 34: 1824; *Middleditch*, 2 Cox, C. C. 313: 1845; *Cooper*, 3 Cox, C. C. 547: 1849 (which is inconsistent with *Middleditch*); *Braynell and Wren*, 4 Cox, C. C. 402: 1850; *Gilgaren*, 63 J. P. 457: 1899; and *A. Girdwood*, 1 Leach (4th ed.) 142; 2 East's Pleas of the Crown, 1120: 1776.

Maples and Tannen came into the conspiracy two years after the first threat charged.

Lever adopted *Roberts'* argument.

Sir Travers Humphreys (with him *Gerald Dodson*) for the Crown. The sole point at issue is whether it was not for the jury to say what is the meaning of ambiguous words; they are not bound to find a meaning favourable to defendant. In the cases cited, whatever the threat was, the accusation was in fact of a crime less than the threat imported. Here Stuart had said that he thought Taylor's words implied some reference to an intended abominable crime: "any man would understand it so." The jury were entitled to consider all the circumstances, including subsequent conduct, and the Lord Chief Justice correctly directed them that they must decide what the words did mean, not what they might mean. It does not matter, as it does in libel, what others understood by the words. In *Braynell, &c.* (above), Williams J. said: "The jury have heard the evidence, and it is for them to say, judging from the prisoners' whole conduct, what was the accusation they intended to make." In *Kain and Nugent*, 8 C. & P. 187: 1837, Park J. (and Parke B.) held that on an indictment like this "the jury need not confine themselves to the consideration of the expressions used before the money was given, but may, if those expressions are equivocal, connect with them what was afterwards said by the prisoner. . . ." Here there was not, perhaps, a threat to accuse of actually having done something, but it was a threat to accuse "with intent to defraud."

[AVORY J.: The indictment alleges in several counts the threat to accuse of the crime, to wit, of having "attempted and en-

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deavoured to commit the abominable crime, &c." Is there any distinction?]

Humphreys. It is common form, taken from the books.

[AVORY J.: "Endeavour," I am inclined to think, suggests some steps towards commission of the suggested crime not sufficiently proximate to be an attempt in law. If "endeavour" covers solicitation, that is sufficient in this case.

SALTER J.: If the indictment includes solicitation, were the jury told that if they found solicitation they must convict, but if not, they must acquit on this count?]

Humphreys. No, the point did not arise.

[AVORY J.: The learned judge seems to have had this point in his mind when he summed up, for he dealt with the word "endeavour."]

Roberts in reply. In *Kain, &c.* the word "sodomy" was used. No authority is needed for the proposition that where conduct is consistent with innocence or guilt a jury must find the former. It is not right that at this stage a new meaning should be sought to be put upon "endeavour" when it was not so much as mentioned at the trial. "Attempt and endeavour"—"and," not "or"—merely means "attempt."

Lever in reply. Words ought not to be strained, colloquially "attempt and endeavour" means "attempt," and not "solicit." The words of the statute "solicit" and "permit" are not to be found in the indictment. The jury could not reasonably find that the threat was to accuse of the crime alleged. He was also heard on the term of sentence.

AVORY J.: The Court appreciates the arguments of the learned counsel for the appellants, but is of opinion that the jury were entitled to take into consideration the whole of the evidence, and were not bound necessarily to find a meaning in the words more

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favourable to the prisoners. All the authorities go to establish this proposition clearly.

The learned judge dealt with the facts of the case.

It is not necessary in our view to draw a distinction which may be drawn between the endeavour and the attempt, both of which are included in this indictment. It may well be that a person may be said to be endeavouring to commit a crime, although he has not actually attempted to commit that crime within the sense in which the word "attempt" has been defined. He may be endeavouring to commit a crime by taking some step towards the commission of the crime which is not sufficiently proximate to constitute the attempt: but it is not necessary to put the case on that ground, because we are of opinion that here there was evidence of the threat charged in the indictment, having in view the circumstances, and particularly having in view the statement or admission made by Stuart himself when he went into the witness-box that he understood the words to mean "a charge of, or a threat to accuse of, the actual crime . . . &c."

The Lord Chief Justice, in his summing-up, distinctly directed the jury—"What is required for the purposes of the section is that there should be a threat to utter an accusation, and that the threat charged in the indictment is one to accuse the prosecutor of having attempted and endeavoured to commit the abominable crime."

The two men who came late into the conspiracy took full advantage of it.

Appeals dismissed.

H. J.

Solicitors for Appellant Tannen—*Messrs. Croft and Russell.*

Solicitors for Appellant Taylor—*E. O'Connor & Co.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE SALTER.

JOSEPHINE O'DARE, WILLIAM GEORGE DAVIS, ADRIAN MORTON.

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There is no rule of law or practice that an approver should receive a lighter sentence in view of his giving evidence for the Crown.

Applications for leave to appeal, against sentence by O'Dare, against conviction and sentence by Davis, and against conviction by Morton. Applicants were sentenced, on June 1st, after a four days' trial (of Davis and Morton separately), at the Central Criminal Court, by the Recorder, O'Dare (who had pleaded guilty on March 17th) to four years' and six months' penal servitude for forging and uttering documents and for obtaining by false pretences, Davis to twelve years' penal servitude for conspiracy and forging and uttering documents, and Morton to three years' penal servitude for conspiracy and uttering a forged will. Other co-defendants did not appeal.

Vine for O'Dare: *Roland Oliver, K.C.*, and *Eric Sachs* for Morton. Applicants were not present.

Only one point calls for report.

Vine. O'Dare gave evidence at the police court and made a statement to the police which led to the arrest and prosecution of the other defendants, and, again, on their trials at the Central Criminal Court. In view of her services to the administration of justice it was submitted that the sentence was too severe: the Recorder distinctly stated that he had not diminished the term by a single day in view of her having given evidence. She had never been convicted before. It was in the public interest to encourage criminals to give evidence against others. He referred to *James* and *Sharman*, 9 Cr. App. R. 143:

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1913: sent. red., and *F. Green*, 13 Cr. App. R. 200: 1918: sent. red.

Oliver, K.C. There was no corroboration of the accomplice's, O'Dare's, evidence against Morton on any point on which their evidence conflicted: her motive was obvious. She had given that evidence before she was sentenced—a very unusual course.

The LORD CHIEF JUSTICE: There is no rule of law or practice that a co-prisoner giving evidence against others should receive a shorter term of sentence for his public services. Perhaps in special circumstances, *e.g.*, where there were signs of repentance, those services might be taken into account, but such an inducement must not be held out as if it were a general rule. The applicant had admittedly led a bad life, and it has never been suggested that the sentence was of itself excessive. The evidence against Morton was sufficient without the accomplice's evidence.

Applications dismissed.

H. J.

Solicitor for O'Dare—*A. Ross Dagg*.

Solicitors for Morton—*Button, Fitch, Aylmer and Cooper*.

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25 *July*.

JAMES HEGGIE BURDON.

Severity of sentence on the driver of a motor car found not to be drunk but "under the influence of drink" for "wanton" driving.

Appeal against conviction and sentence by leave of the Court.

Appellant was convicted at the Middlesex Sessions on June 11th, 1927, under s. 35 of 24 & 25 Vict. c. 100, of causing bodily harm by the wanton driving of a motor car on April 28th, 1927, but acquitted of being drunk while in charge of a motor car (Criminal Justice Act, 1925, s. 40) on the same occasion, and was sentenced by the Chairman to twenty-two months' imprisonment in the second division.

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G. Raphael for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present, dealt with the facts (which sufficiently appear from the judgment), and, in suggesting misdirection, argued that although a jury need not be told in terms what "wanton" driving means, they must not be led to believe that because someone is knocked down by a car there must necessarily be wanton driving, and still less that anyone who is drunk while driving a car is necessarily driving wantonly. The true direction is that in *Bateman*, 94 L. J. K. B. 791; 28 Cox, C. C. 33; 89 J. P. 162; 133 L. T. 730; 41 T. L. R. 557; 19 Cr. App. R. 8: 1925: c. q.: counsel also referred to *Manzoni* v. *Douglas*, 1880, 6 Q. B. D. 145. The learned Chairman interpreted the words of the statute "by wilful misconduct or . . . neglect" thus: "That is to say, that by the liquor he had taken he had not full possession of his powers of driving." His direction came to this: "wanton driving amounts to a man being in a *peculiar* state, and if it is due to drink you will find him guilty of being drunk."

[AVORY J.: Surely the fair meaning of that passage is—"if you are not satisfied he was drunk but under the influence of drink, and in consequence of that drove in a wanton way, then convict him on that count."

SALTER J.: Is it not "wilful misconduct or neglect" if a man takes so much drink, without being drunk, that he is incapable of driving properly and causes bodily harm?

THE LORD CHIEF JUSTICE: He does not *will* to drive negligently, but he does will to put himself into that condition which causes him to drive negligently.]

The verdict was on count one "Guilty of being under the influence of drink": when the Clerk put the question for the third time "on count one" the foreman said "Guilty": then the Clerk said "On the second count he is charged with a like offence": and the foreman said "Guilty." When the Clerk put the question on the third count, the foreman thought that it referred to "driving in a wanton manner, and said: "For driving in a drunken manner we say yes, he is guilty." This does not amount to a verdict of guilty on counts one and two. Counsel for the Crown intervened

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and a verdict of not guilty was entered on the third count (being drunk, &c.).

The sentence was too severe: there is nothing recorded against appellant except a fine of £1 for being drunk while in charge of a motor cycle, and a summary offence of assault, and he has a good character from his employers and the police for general sobriety.

J. F. Eastwood, for the Crown, was not called upon.

THE LORD CHIEF JUSTICE (*a*): . . . To deal first with conviction, the evidence was that on the evening of the 28th of April at about half-past nine, Mr. Proctor and Miss Page were walking arm in arm in the roadway close to the kerbstone on the near side, and they were suddenly run into from behind by a motor car, and they suffered severe injuries which made it necessary that they should be taken to hospital. In the course of the case it speedily became common ground that the car which was driven by the appellant was the car which had caused these injuries. On the part of the prosecution it was urged that the appellant was drunk at the time. The defence put forward was that the appellant was not in the least drunk, and that the accident was caused by his being made unable to see the persons whom he shortly afterwards ran into because he was dazzled by the headlights of an on-coming car. There was in the indictment another count which charged him with being drunk in charge of a motor car on the highway, but upon that count the jury found the appellant was not guilty. A question arose about the admissibility of the evidence of two witnesses, Pitt and Miss Keen, who ultimately gave evidence, Pitt to the effect that some three miles from the scene of the accident a car was in front of him in the road which was driven in a zigzag way, and that he followed this car, but lost sight of it, that no other car passed him, but that he saw another similar car at the scene of the accident, and that was the car which caused the injuries; and Miss Keen's evidence was to the effect that a car stopped in the road, and the driver of the car addressed her in a drunken way, and asked her into the car; and that afterwards she was taken to a garage and picked out the car

(*a*) Printed from a *verbatim* transcript supplied by the courtesy of the Clerk of the Peace for Middlesex.

which in fact the appellant had driven, but she did not identify the appellant. It was held that this evidence was admissible, and that it was admissible we do not doubt—the question of the degree of weight to be given to the evidence was entirely a matter for the jury. Now there was other evidence, and in particular evidence of the appellant standing by his car and appearing to be drunk, because he was swaying about, and a police officer, who was brought upon the scene by the witness Pitt, said that he saw the appellant leaning against his car, that he was unsteady, and smelt of intoxicating liquor, and he said that with the help of another officer he took the appellant to the police station, where he was unsteady, and would have fallen if he had not been supported. That evidence was corroborated by the evidence of the other police officer. On arriving at the station the appellant was examined by a doctor, and that doctor said, "In my opinion he was drunk." The appellant then asked that his own doctor might be brought, and his own doctor was brought, and afterwards gave evidence, and his evidence was that he was not drunk, and there was a conflict of evidence. Upon those materials, and others which it is not necessary to reiterate, the members of the jury came to the conclusion that the appellant was guilty upon counts one and two, and it cannot be denied that there was evidence, and ample evidence, to justify that conclusion. But it is said that the summing-up was grossly unsatisfactory, and that in at least two respects—it is said first that the summing-up did not accurately state the law, and that criticism upon analysis resolves itself into this, that upon an indictment of this kind it is the duty, as it is alleged, of the court to explain the terms of the section by reference to the appropriate summing-up in a prosecution for manslaughter by negligence. There is no such duty upon the court—the duty upon the court is to call attention to the words of the section, and, so far as they need explanation, to explain them, but certainly not to make one difficult matter easier by reference to a matter more difficult still. Here again and again the Chairman referred to the very words of the section. With regard to the facts, it is quite true that there are two or three passages in the summing-up in which the Chairman made some mistakes, and in particular with reference to the evidence of the witness Miss Alice Keen; but with regard to that, the error into which the learned Chairman had for the moment fallen was corrected in the clearest terms by the learned counsel for the prosecution, who pointed out

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that Miss Keen was unable to identify either the car, the cap, or the appellant himself, and when the correction was made, and of course, accepted at once by the learned Chairman, the foreman of the jury made a remark which showed that, whatever else had happened, the error had not, at any rate, misled him, because he said: "We heard the lady say that she did not recognise the man"; and at the conclusion of the whole matter, in the last few minutes of the summing-up, the learned Chairman put the issue before the jury in terms to which no exception can be taken: he said this: "It is for you to say now, first of all, was he drunk?—Yes or no—was he driving in a wanton manner causing this bodily harm?—Yes or No—and if you find that he was drunk, then of course the drunkenness would amply account for the wanton and irregular driving in the road. If you do not find him to have been drunk, you must consider the question whether the liquor which this man had was sufficient to put him in a very peculiar state so that he was not fit to drive, though it may not have been actual drunkenness, but I suggest to you that you must consider carefully whether it was not such a state that rendered him incapable of proper driving." After that direction, the jury considered their verdict for something like fifty minutes, and returned into court, and, various other questions having been asked them, said by the mouth of their foreman: "We could not say what the degree of drunkenness is; there are different degrees of drunkenness, but we all agree that this man under the influence of drink did cause this wanton damage." In other words, the jury appear to have discriminated with care upon this question of drink and the influence of drink in this case. They were not prepared to say that the appellant was drunk, and upon that count in the indictment they acquitted him—they were all satisfied that by reason of the quantity of liquor he had taken he was driving in a wanton manner, and by driving in that manner inflicted the injuries, which were not in controversy. In those circumstances it seems to us that this conviction ought to stand.

With regard to the sentence, the sentence is no doubt a stiff sentence, but there is not much utility in contrasting and comparing this sentence with other sentences passed in other cases where the circumstances were different. The question for us is whether this sentence is wrong, and whether it is wrong to such an extent and in such a way as to call for revision at our hands. It would be idle to pursue the kind of comparison which has been indicated

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between this case and some others, but two things are obvious—the first is that in this case the jury were clearly of the opinion that the wanton driving which they found was due to excessive drinking; the second is that this appellant had already on a previous occasion been punished, not indeed by being sent to prison, but by being fined for being drunk in charge of a motor cycle. That conviction was so recently as the 9th of February, 1926, so that it seems to have produced little effect upon him, because on the 28th of April, 1927, he is behaving in a way which the jury in this case have found. Having regard to the frequency and the gravity of offences of this kind, and to the notorious state of the public highways, we see no reason for interfering with this sentence, and the appeal is in both respects dismissed. Leave having been given to appeal, the sentence will run, not from this day, but from the day on which it was passed.

Appeal dismissed.

H. J.

EDWIN HORACE NALL.

25 & 26 *July.*

A remanet *term cannot be served concurrently with a fresh sentence.*

Appeal against sentence by leave.

Appellant (who was present) was convicted at the Berkshire Sessions on June 21st, 1927, of obtaining five pounds and credit for two pounds by false pretences, &c., and was sentenced to five years' penal servitude, "to run concurrently with an existing unexpired sentence" (of fifteen months).

The Court pointed out that under s. 9 of 27 & 28 Vict. c. 47, the Penal Servitude Act, 1864, such a sentence could not be passed; a *remanet* must be served after the new sentence. To give effect to the intention of the Court below, which was to include the *remanet* in the term of five years, the sentence will be reduced to a term of three and a half years, to run from the date of conviction.

Sentence reduced.

H. J.

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DORA HARRIS.

After the close of the case for the defence, the judge ought to call a witness, proprio motu, *only if the defence has set up a case* ex improviso.

The true rule for direction in an accomplice's evidence was laid down in Beebe, 19 *Cr. A. R.* 22: 1925.

Appeal against conviction and sentence by leave of the Court.

Appellant was convicted with others on June 10th, 1927, after a two days' trial, at the Liverpool City Sessions, of knowingly receiving stolen goods, and was sentenced by the Recorder to fifteen months' imprisonment with hard labour.

Maxwell Fyffe for the appellant, who was not present. The main ground of appeal is that after the close of the case for the defence, the three female defendants having given evidence for themselves, the learned Recorder, *proprio motu*, asked a co-defendant, Benton, who had pleaded guilty to the theft, and remained throughout the trial in the dock, whether he was willing to give evidence, and on his saying that he was, he called him as a witness and examined him. The Recorder had the written statement Benton had given to the police, and knew that it was adverse to this appellant, as was his evidence. The Recorder informed him that his testimony would not affect the sentence he should pass upon him. The Recorder remarked to appellant's counsel (*Fyffe*): "It is the practice to allow cross-examination in these circumstances, and you may cross-examine him," and counsel did so. He did not object to the course taken at the moment.

It is submitted that for the judge to call a witness for the prosecution at *that* stage is an irregularity sufficient to quash the conviction.

He cited *Chapman*, 8 C. & P. 558: 1838; *Holden*, *ibid.* 606: 1838 (murder), where two persons who were in Court were called by the order of Patteson J. during the case for the Crown, and the latter, a surgeon, "was examined by the learned judge," who said: "He is a material witness who is not called on the part of the prosecution, and as he is in Court I shall call him for the furtherance of justice"; *Coulson* v. *Disborough*, 1894, 2 Q. B. 316; 70 L. T. 617; 10 T. L. R. 429; 58 J. P. 784; 42 W. R. 449: C. A., which only deals with civil cases; *In re Enoch, &c.*,

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1910, 1 K. B. 327: C. A., where Fletcher Moulton L.J. qualified Lord Esher's judgment in *Coulson* v. *Disborough* by insisting most emphatically that if a judge does call a witness it must never be against the will of one of the parties, otherwise "the civil rights of a man might be decided by evidence given by persons whose personal credibility and the accuracy of whose statements he would have no right to test by cross-examination; because the Court of Appeal laid down that if a judge calls a witness neither party can cross-examine him as of right."

But even in a criminal case it is not proper for the judge to call a witness if it is known or believed that he will make a violent attack on a co-defendant, or on one side or the other; he comes, as it were, with the *imprimatur* of the judge.

In *Cliburn*, 62 J. P. 232; 127 Sessions Papers, 368; C. C. C.: 1898, a solicitor was called by the Court at his own request and "in the interests of justice." Fulton Common Serjeant allowed him to depose, but refused to allow the prosecution to cross-examine him, but allowed questions to him on certain points through the judge. There the case for the prosecution had closed, and the defence was not going to call witnesses. In *W. Tomey*, 2 Cr. App. R. 329: 1909, one prisoner who had pleaded guilty was sentenced and then called against the others. In *Baguley*, 19 Cr. App. R. 54: 1925 (receiving) (which also came from the same Court as this case), this Court held that the jury must be carefully directed about the testimony of the thief called before he is sentenced, and the conviction of the receiver was quashed. In the Costs in Criminal Cases Act, 1908 (8 Edw. 7, c. 15), s. 1 (2), there is a recognition of the right of a judge to call witnesses.

[AVORY J. cited *W. Sullivan*, 1923, 1 K. B. 47; 91 L. J. K. B. 927; 126 L. T. 643; 86 J. P. 167; 16 Cr. App. R. 121 (murder), where, owing to a suggestion by counsel for the defence in his speech to the jury, the judge directed three witnesses for the prosecution to be recalled; they were questioned, and an opportunity was given to that counsel to cross-examine them and to address the jury again. This Court held that as these witnesses were called to rebut the case set up by the prisoner in his evidence and of meeting counsel's suggestion, the judge had acted rightly.]

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Lynskey for the respondents. There is no restriction, as has been suggested, to the judge's right: it is not limited to "extraordinary" cases; the real and only ground is that of *Holden* and *Cliburn* (above), viz., "the interests of justice." It is true that Benton's evidence hurt one of the prisoners, but it helped another: indeed, after it was given, she was discharged. I considered carefully whether I should call Benton and decided not to.

[THE LORD CHIEF JUSTICE: Then his evidence was not "*ex improviso*," to use Tindall J.'s expression in *Frost* (below).

SALTER J.: After his evidence neither woman gave further evidence.]

Their counsel did not ask for it.

[THE LORD CHIEF JUSTICE: Nor was it suggested that they were entitled to do so.

AVORY J.: Benton was in the dock all the time—contrary to all practice in the case of a prisoner likely to be a witness—here he could easily mould his story to contradict the appellant Harris; her defence was that she did not know the goods were stolen.]

His evidence merely contained additions to his statement—it was corroboration of one prisoner (the acquitted woman) and rebutting evidence against the other, Harris. He was called at exactly the same stage as the witness in *Cliburn*.

[THE LORD CHIEF JUSTICE referred to *Haynes*, 1 Foster & Finlater, 666: 1859 (murder). Bramwell B. was asked by the prosecution after the final speeches to call the prison surgeon, but refused on the ground that it would necessitate two more speeches. "The only doubt I have is whether I should examine him." He consulted Crompton J., and both agreed "that it would be inexpedient to allow this fresh evidence to be gone into after the close of the whole case."]

There was a warning in the summing-up about corroboration of an accomplice.

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[The LORD CHIEF JUSTICE: It reads, "If possible you will find corroboration," which seems to me, "It is not safe to do so, but you can convict if you like on the accomplice's evidence."

[AVORY J.: Or, "This appears to be a case in which you need not require corroboration"; it cannot be reconciled with *Beebe*, 19 Cr. App. R. 22; 133 L. T. 736; 89 J. P. 175; 41 T. L. R. 635: 1925: c.q., where my lord laid down the true rule of direction in these cases.]

AVORY J. (after dealing with the various incidents of the trial): The two questions for this Court are, was the course taken of calling Benton at the stage at which he was called in accordance with the recognised rules, and assuming that it was, was there a proper direction on the corroboration of accomplices? It is clear from the cases that only in a criminal case may the judge call a witness at all, but in no case is there a definite rule at what stage he may do so. But it is obvious that injustice may be done to a defendant unless some limitation is put on the power, and for this case we adopt the words of Tindal C.J. [cited *Sullivan* (above) from *Frost*, 4 St. Tr. N. S. 86, 386: 1839]: "Where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown." That passage only applies to the Crown, but it should also apply to the judge who calls a witness, *i.e.*, after the close of the case for the defence fresh evidence is limited to something arising "*ex improviso*." Bramwell B. acted on this principle in *Haynes* (above). A further objection in this case is that Benton was present in the dock throughout, and no doubt understood that he was asked to supplement the case against this appellant; moreover he was then unsentenced, and therefore had everything to expect from the judge.

In these circumstances, and without laying it down that in no

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circumstances may an additional witness be called by the judge after the close of the defence, we think that in this case it was irregular, and calculated to do an injustice to this appellant. Further, on the question of corroboration, the jury were told that they must receive the accomplice's evidence "with suspicion; it is not the judge's duty to tell them that they must not accept it, but *if possible* they should find corroboration of it," and that juries were entitled to convict without it, but that this was seldom done. This so-called warning appears to us defective; it might mean: this is one of the cases where you need not insist on corroboration. The true rule was laid down in *Beebe* (above), where my lord said of a summing-up in words which exactly apply here: "That warning may well convey to the minds of the jury that, although as a rule it is dangerous to convict on the evidence of an accomplice, that rule is by no means of universal application, and that there may be cases in which it is quite safe to convict upon the evidence of an accomplice without corroboration, and by implication that this case is one of such cases." On both grounds this trial was unsatisfactory.

Conviction quashed.

H. J.

Solicitor for Appellant—*John A. Behn*, Liverpool.

Solicitor for the Respondents, the Liverpool Police—*The Town Clerk of Liverpool.*

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26 *July*.

BRUCE BOWMAN.

Severity of sentence mitigated in view of an interval of honest life.

Appeal against sentence by leave.

Appellant pleaded guilty on July 4th, 1927, to two indictments for warehousebreaking and shopbreaking, and was sentenced by the Chairman of the Durham County Sessions to five years' penal servitude.

H. Malone for the appellant, who was present. The sentence was too severe: at one time appellant had a good record. The

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amount stolen was trivial, and during his two years' liberty after his release from prison he had been working hard; unfortunately a witness to this effect, an old employer, could not attend at the trial.

SALTER J.: In this case there were two indictments where one would have sufficed, as the offences charged were by the same person, in the same night, and in the same town; it is a case clearly within the Indictment Rules for one indictment, and the extra expense ought not to have been incurred. The Court is informed by the Clerk of the Peace that such is "the practice" in that county. The sooner the practice is altered the better.

No doubt appellant's record had been bad, and this crime was the work of a practised housebreaker, but the Court has the evidence (in a letter from the late employer mentioned by counsel) that for two years he had worked well. That is the sort of man which, as this Court has often said, it is desirable to encourage. Therefore the Court will reduce the sentence to one of twelve months' imprisonment from the date of conviction.

Sentence reduced.

SALTER J. added that on the application of counsel for the prosecution the Court below had made an order that out of money found on the prisoner a sum (about £7) should be given to the prosecutors as compensation for damage by him to a safe (though no property was taken); this purported to be under s. 4 of 33 & 34 Vict. c. 23, the Forfeiture Act, 1870, under which "by way of satisfaction or compensation for any loss of property" due to the felony a sum may be awarded by the Court from prisoner's moneys. There was no evidence here of any "loss" within the meaning of the section. The order must be set aside.

Order of Quarter Sessions set aside.

H. J.

Solicitors for Appellant—*Lynskey & Sons*, Liverpool.

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SAMUEL SIDNEY BAGGOTT.

Counsel for the Crown is not entitled to a second speech against a defendant because at the jury's request the latter writes his signature and hands it in.

Appeal by leave against conviction and sentence.

Appellant was convicted on July 6th, 1927, at the Norfolk (King's Lynn) Sessions, of forgery and larceny, and was sentenced by the Chairman to six months' imprisonment with hard labour.

Ruston for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. During the course of the case the jury asked for appellant's writing of "C. Foley," in order to compare it with the alleged forged signature "C. Foley" before them. He thereupon wrote this name in the dock and put in the paper. Counsel for the prosecution objected to this course, but the Chairman admitted it, and told counsel that that gave him the right of reply. Prisoner was undefended, and had said that he would not give evidence. Thereupon prosecuting counsel made a second speech, not confined to the written paper, but on the whole case, and in the course of it he said: "Even if he (appellant) was not the man who signed, he was equally guilty if he took part"; this was not criticised by the Court. In *Aldridge*, 1 F. & F. 781: 1863 (forgery), Wightman J. refused to admit a signature by prisoner similarly obtained for comparison in evidence for the prosecution. No case seems to be known in which such an incident has been held to be giving evidence by a defendant.

A. Hawke for the Crown. Putting in a document is technically evidence. In any case there was no miscarriage of justice: the facts were clear.

The Lord Chief Justice (*a*): Appellant's case was that he was not the man who gave the forged receipt at the post office and took away, *i.e.*, stole, the postal packet, but he was convicted on these two counts. Appellant, who was not represented by counsel, offered no evidence, but he did make some remarks to

(*a*) This judgment is printed from a transcript supplied by the courtesy of the Director of Public Prosecutions.

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the jury saying that the signature on the receipt was not his, that if he had been guilty of the offence he could have been dealt with at Downham Market instead of being kept in custody for nine weeks, and suggesting that it was not in the least a necessary consequence that he was the person who had put this signature upon the document. Thereupon a member of the jury asked whether the appellant could sign something, and in the result, after various passages which have been read, and which need not now be re-read, the appellant did say he was willing to write his name, and he wrote the name of "Foley" on a piece of paper. The learned counsel for the prosecution objected to that course, saying that the appellant was giving uncross-examined evidence, whereupon the Chairman said: "I think I may treat it as though it was evidence put in, and that will of course entitle you to reply," and that, too, although the prisoner had said quite plainly that he did not wish to give evidence. After that ruling by the Chairman the counsel for the prosecution made another speech, a speech not dealing by any means exclusively with the topic of handwriting, but surveying the whole case, and telling the jury, among other things, in a sentence which does not appear at any time to have been corrected, that even though this appellant were not the man who had signed the receipt, nevertheless he was equally guilty with the man who had signed it if he took advantage of it. Now in order to perceive the effect, or the probable effect of those words, one has to remember that the plain suggestion was that the other man, Bushell, had committed this offence, and had afterwards purchased two railway tickets, one for himself and one for the appellant, and this uncorrected passage in the second speech for the prosecution may well have conveyed to the minds of the jury that it was enough if in some way the appellant had shared, whether he knew it or not, the proceeds of this £1. Of course, there ought never to have been a second speech at all. As was said by this Court, for example, in the case of *Harrison*, in 17 Cr. App. R. 156: 1923: "We desire to point out very clearly that the rule about counsel in such circumstances," that is to say, in circumstances where an undefended prisoner calls no witness other than himself, "not addressing the jury a second time is one which ought to be carefully observed, and it might be that in another case this Court would have to hold that a conviction, in a trial where such an irregularity occurred, must be quashed."

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Since that time there have been occasions, including one comparatively recent occasion, where a conviction was quashed upon that ground. That episode in itself is sufficient to conclude the matter, but it is quite evident, when one looks at the transcript of these proceedings, that there were various irregularities, and that the jury were never really instructed about the law applicable to each one of those three different counts. In the result they found this appellant guilty both of obtaining the packet by means of a forged receipt and of stealing it, and with a little encouragement, it is quite obvious from a certain passage of the transcript, they would have found him guilty, I will not say of anything else, but under the remaining count. So he was convicted, and having been convicted in that way, he was asked whether he had anything to say to the Court before judgment was passed on him according to law, and, strange to say, the prisoner then said: "I say I should like to be tried by another Court." It is quite clear that this conviction cannot stand; the appeal is allowed and the conviction is quashed.

Conviction quashed.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE GREER.

ISIDORE EDWARD BROWN.

Application for bail.

Appeal from an order of Shearman J. refusing bail pending appeal.

Appellant was convicted at the Central Criminal Court, after a trial lasting fourteen days, on June 1st, 1927, of obtaining money by false pretences, and was sentenced by the Common Serjeant to three years' penal servitude. Originally there were six defendants, but only two were convicted.

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Cassels, K.C. (with him *Eddy*). Till this case there was nothing against this man's character, and from the commencement of the proceedings to the end he had been allowed bail. No application in this case could be heard by the Court till October, owing to the amount of the documents. Substantial sureties and bail were forthcoming.

AVORY J.: Shearman J. called for the transcript of the summing-up of which complaint was made, and having read it, had refused bail. The Court cannot allow this application.

Application dismissed.

H. J.

Solicitors for Applicant—*S. Myers & Son.*

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28 *July*.

HERBERT PRESDEE.

Whether defendant is "drunk" within s. 40 (1) *of* 15 *&* 16 *Geo.* 5, *c.* 86, *the Criminal Justice Act*, 1925, *is a question for the jury.*

Appeal against conviction and sentence on certificate.

Appellant was convicted at the Worcestershire Sessions, on July 4th, 1927, of being drunk while in charge of a motor car, and was sentenced by the Chairman to one month's imprisonment in the second division. He was not in custody.

Sir Travers Humphreys (with him *Douglas Jenkins*) for the appellant. The offence charged was under s. 40 (1) of 15 & 16 Geo. 5, c. 86, the Criminal Justice Act, 1925. "Any person who is drunk while in charge on any highway or other public place of any mechanically-propelled vehicle," may be sentenced to four months' imprisonment. The question is, is it for the judge or the jury to decide whether defendant is drunk? The verdict was "guilty of being incapable of driving a motor car brought about by alcohol, but he was not drunk—not drunk to the extent we should call a drunken man (*sic*)." They had previously come into Court and said that some of them thought that he was drunk, and

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some that he was not. The Chairman said: "Don't be frightened by the word drunk. I suggest you should ask yourselves, was he unfit to drive a motor car, and was that brought about by alcohol?" A man is not necessarily drunk at all because he is unfit through alcohol to drive a motor car. Here the offence is drunkenness: the motor car, so to say, is a mere aggravation.

[GREER J.: "Drunk" is what an ordinary reasonable person would consider such.

The LORD CHIEF JUSTICE: The Chairman thought that the Act ought to contain a definition of the word.]

A. G. Long for the Crown. The verdict must be read as a whole. There is a higher standard of sobriety for a man in charge of a motor car.

The LORD CHIEF JUSTICE: No ingenuity or argument can get rid of the plain words "he was not drunk." That is—not guilty. When the jury returned to say that they were divided, the Chairman gave them his view. Whether the word "drunk" in the Act ought to be defined at all, and as the Chairman defined it, may be well worthy of consideration.

Conviction quashed.

H. J.

Solicitor for Appellant—*T. Haynes Duffell,* Birmingham.

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29 *July.*

HAROLD KNOX.

Conviction quashed in view of fresh evidence.

Appeal against conviction and sentence by leave of the Court, and application for leave to call further evidence.

Appellant was convicted on 6th July, 1927, at the County of London Sessions, of indecent assault upon a child, and was sentenced by the Deputy-Chairman to six months' imprisonment with hard labour.

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On July 28th *Seaton* applied for leave to appeal on the ground of fresh evidence; in view of the approach of the Long Vacation, the Court gave leave for the next day.

R. E. Seaton for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Owing to the fact that this was a dock brief, undertaken at short notice, I was unable to read all the various scraps of paper handed to me by appellant, and was thereby prevented from calling a witness to whom the child made her first statement after the alleged assault.

The Court gave leave to call this witness.

H. Hardes was called and examined by *Seaton*. His evidence was to the effect that shortly after the alleged assault the child was questioned by him; appellant lodged in his house. She then denied that anything improper had taken place.

He was cross-examined by *Eastwood* for the Crown.

Seaton. The statement to Hardes was admittedly the first made by the child. The summing-up was unsatisfactory. The learned Deputy-Chairman invited the jury to accept as evidence against appellant the fact that the people with whom he lodged having heard the story against him believed it.

[The LORD CHIEF JUSTICE: If the further evidence had been before the Court the learned Deputy-Chairman could not possibly have given utterance to that remark.]

[He was stopped.]

J. F. Eastwood for the Crown.

The LORD CHIEF JUSTICE: It is unnecessary to go over the evidence in this case, but a very strong point at the trial was that appellant got no support at the trial from the people with whom he lived, but that they seemed to be against him.

Unfortunately, in consequence of an accident which counsel has fully explained, Mr. Hardes, the man with whom appellant

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lodged, who had made and was prepared to make a most important statement about what the child had said to him after the incident, was not called. Of the various bits of paper handed to counsel for appellant, he did not see one which explained that Hardes could give this evidence. Not only, therefore, did appellant not benefit from Mr. Hardes' evidence, but he suffered from its not being given.

If that evidence had been accepted as we now accept it, the summing-up would have been different. If Mr. Hardes had been called, the jury would have been able to test the evidence of the girl at the trial by what he said she had said to him. It would have then been right to ask the jury how much weight they ought to give her statement if they believed his evidence. The learned Deputy-Chairman would then have warned the jury that if they believed Mr. Hardes' evidence it would not be safe to convict. Then no complaint could have been made against the summing-up.

In these circumstances s. 4 (1) of the Criminal Appeal Act, 1907, applies. It runs: "The Court of Criminal Appeal in any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that . . . it cannot be supported having regard to the evidence;" as it is, with the further evidence before us, the conviction cannot be supported.

Conviction quashed.

I. C. D.

BEFORE

MR. JUSTICE SWIFT, MR. JUSTICE BRANSON AND MR. JUSTICE WRIGHT.

18 *August.*

GEORGE WILLIAM SEYMOUR.

When a statement by one defendant intended to be put in evidence implicates another, the court of trial should consider whether they should not be tried separately.

Appeal against conviction.

Appellant was convicted on July 9th, 1927, at the Portsmouth City Sessions, of knowingly receiving stolen property, and was

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sentenced by the Deputy-Recorder to twelve months' imprisonment with hard labour.

A. H. Armstrong for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present.

John Harris for the Crown.

Only one point calls for report; a co-defendant, Fowler, who was ultimately convicted, when arrested by the police made a statement which, if true, was conclusive of appellant's guilt. This statement was given in evidence.

Harris explained that the jury were warned by the Court, and by counsel on both sides, that this statement was only admissible against Fowler.

[WRIGHT J.: Was there any application to try the defendants separately?]

Armstrong. No. Fowler had been of great assistance to the police, and he could have been called against Seymour.

[WRIGHT J.: The proper course was to try Fowler first and then call him.]

BRANSON J. (*a*): This appellant was convicted at the City of Portsmouth Quarter Sessions, before the Deputy-Recorder, on a count in an indictment charging him and other persons with receiving a quantity of silver and plated articles, and he was sentenced to twelve months' hard labour. The appeal is against his conviction. The facts of the case can shortly be stated sufficiently for this judgment as follows: One Weekes, a jeweller, kept some stock at his flat at Western Parade, Southsea; that flat was broken into and entered, and the property was stolen by a man called Saxton, who pleaded guilty to that offence, and was called as a witness by the prosecution at the trial of the appellant and four other persons who were charged together with this man. The question which we have to determine is whether there was

(*a*) This judgment is printed from a transcript supplied by the courtesy of the Director of Public Prosecutions.

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evidence called which was evidence against the present appellant sufficient to justify the conviction which was recorded against him. His part in the offence, so far as the evidence goes, was this. It appears that the goods which had been stolen by Saxton were taken by him to the house of Molloy, that Molloy brought Fowler on to the scene, that Fowler took the two cases containing the stolen goods to a public-house, the "Colewort Arms," then Gordon and Molloy, on Fowler's request, took them away from there, and Molloy and Gordon gave evidence that they had been taken in the suit cases from the "Colewort Arms," and they left them in the wash-house of a witness called Wood. There was evidence that the suit cases were taken next day from Wood to the "Victory Arms" beer-house, and then they were traced from the "Victory Arms" beer-house to the store of Fowler; then an assistant of Fowler's said she received these suit cases and put them on shelves, and later on that Fowler put them into a barrel. Then Gates, a market gardener, said that Fowler asked him if he would take some of his rubbish away, and two barrels were put on to his lorry; Fowler got on to the lorry with them and asked him to stop at the appellant's store. When they got to the appellant's store, the appellant's son jumped on to the lorry and took off one of the barrels, and the other barrel was taken away by Gates and tipped out upon his rubbish heap. Gates says that he saw young Seymour, the son of the appellant, when he took the barrels from the yard, putting some green things upon it, and it is said that there was also evidence that when the lorry arrived and the barrel was taken down by young Seymour, the appellant was present, though it does not appear upon the shorthand notes. The next bit of evidence against the appellant is that later in the same day he was seen sitting at a table in a public-house called the "Traveller's Rest" with Fowler, Gibb and Yates, and a man named Skinner gave evidence that Gibb sent him with a note to the "Balmoral Arms," and that he saw the appellant with Gibb, and Yates, and Fowler at the "Traveller's Rest" upon his return. Now the only other bit of evidence against the appellant was that when the police had obtained a statement from Fowler implicating the appellant, the appellant was told that such a statement had been made, was asked to account for the barrel, and said that he had paid 6*d*. to Gates for some greens for his pony and that they were what was in the barrel.

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Now it appears to us that, putting together the whole of this evidence, it does not amount to enough to justify a verdict against the appellant; it amounts to suspicion and no more, and we think that it is unsatisfactory that a conviction should have been arrived at by the jury upon this evidence, and the more so because, owing to the fact that all these prisoners were tried together, it became necessary for the prosecution to read before the jury the statement made by Fowler containing a considerable amount of detail about what Seymour was alleged to have done in taking part in receiving and disposing of these stolen goods, and though counsel warned the jury and the Deputy-Recorder warned the jury that what Fowler said in his statement was only evidence against Fowler himself, and not against the other prisoners, it is plain that an atmosphere of suspicion against Seymour must have been created by the reading of the statement, and coupling that fact with the absence of any real conclusive evidence against Seymour, we think that the proper course is to allow this appeal and quash the conviction against the appellant.

Conviction quashed.

H. J.

JOHN ROBERT LONG.

The Court leans against a longer term of imprisonment with hard labour than two years.

Appeal against sentence.

Appellant (who was present) pleaded guilty at the West Riding Yorkshire (Sheffield) Sessions, on July 15th, 1927, to an indecent assault, and was sentenced by the Chairman to two years' imprisonment with hard labour and, as an incorrigible rogue, to twelve months' imprisonment with hard labour consecutive, and to fifteen strokes of the birch.

SWIFT J.: No doubt appellant deserves severe punishment, but the Legislature has recently marked its dislike of a longer term of

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imprisonment with hard labour than two years; hence we substitute for "consecutive," concurrent, and in view of appellant's age and antecedents we quash the sentence of fifteen strokes.

Sentence reduced.

H. J.

SIDNEY JOHNSON.

Severity of sentence mitigated in view of youth.

Appeal against sentence.

Appellant was convicted on July 11th, 1927, at the Norwich City Sessions, of housebreaking, and was sentenced by the Deputy-Recorder to five years' penal servitude.

Engelbach for the appellant, who was not present. The learned Deputy-Recorder was determined to "make an example" of five boys, all charged or guilty of several similar offences, and this appellant was the oldest of them. Till September, 1926, there was absolutely nothing against him, and then when he was unemployed owing to a strike he was bound over for being found on enclosed premises at night. He was undefended, and is only twenty-four years old.

SWIFT J.: In view of his age and the fact that this is his first term of imprisonment, the sentence is reduced to twenty-one months' imprisonment with hard labour.

Sentence reduced.

H. J.

Solicitors for Appellant—*Daynes, Son & Keep,* Norwich.

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The Court is bound by the official transcript of a judgment of the court of trial in the absence of evidence of error therein.

Appeal against conviction and sentence.

Appellant was convicted on July 12th, 1927, at the Hampshire Sessions, of larceny and garage-breaking, and was sentenced by the learned Chairman to three years' penal servitude.

Seaton for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present.

John Harris for the Crown.

There were several grounds of appeal, the chief being that the learned Chairman had expressly admitted an unsworn statement by a co-defendant as evidence against the appellant; this was borne out by the official shorthand report, but *Harris* contended that this was a manifest error, and pointed out that the learned judge in another passage cautioned the jury against this statement.

WRIGHT J. (*a*): This is an appeal by the prisoner, Edric Martin, who was convicted at the Hampshire Quarter Sessions, before Judge Barnard Lailey, K.C., who was Chairman, and other justices. He was convicted on an indictment charging him with three separate offences, I think, under five counts; he was indicted along with another man named Clapp, and they were charged with stealing and receiving a motor car at Devizes between the 29th May and the 1st June; that car was a Chevrolet car They were also charged with garage-breaking and stealing twenty tins of oil at Mattingley between the 9th and 12th June, and also with garage-breaking and stealing a motor car and a microscope on the 11th June; that other car was an Austin car. The jury found the appellant guilty on all counts, and he was sentenced to three years' penal servitude. The principal trouble which has arisen in this case is this: Clapp, when under arrest and being taken under custody from one place to another for

(*a*) This judgment is printed from a *verbatim* transcript supplied by the courtesy of the Director of Public Prosecutions.

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confinement, made a statement to a police officer, and the statement which he made was in these terms. He says: "We," that is to say, himself and Martin, the present appellant, "broke into the garage to get some petrol. As we were leaving another car drove up and stopped at the garage. We then ran across the fields, broke into the other garage and got the car. I could not drive it because it was too powerful." Now that statement obviously refers to getting petrol for the first car, and the breaking and entering into the other garage and the stealing of the Austin car. Now that was a confession so far as Clapp was concerned, but Clapp was not called as a witness, nor did he give evidence on his own account, and, therefore, so far as anyone but himself was concerned, any statement by him, or any evidence from him, was not before the court at all. In those circumstances it is quite clear that the jury ought to have been warned very carefully and very clearly that they were, in considering the case of Martin, to disregard entirely and put entirely from their minds any statement or anything contained in the statement made by Clapp. Now what appears on the shorthand notes of the summing-up—I will only read the relevant passage—is this; this is what the Chairman says: "When caught, Clapp said, 'I have been here all night.' Later he is taken to Aldershot, where he is charged by a constable, and before I read his reply I will remind you that a statement made by the prisoner Clapp against Martin is cogent evidence, and a jury should have no difficulty in accepting it, but the evidence he gives of an alleged accomplice should be accepted with great caution, and where that evidence against another man is the only evidence, juries should be slow to accept it. Therefore I also warn you not to accept the evidence of Martin against Clapp unless it is supported by other evidence. Clapp's statement was"—then the learned Chairman sets out the statement. "If you accept the evidence of the police officer as to the statement made by Clapp it is very strong evidence indeed. You could not have it much stronger. As regards Martin, the evidence is such that you should act upon it very cautiously. As regards the second car, the evidence, if you choose to act upon it, is that he was driving it, and that he had a grey coat on. I think those are the only material facts, and it will be for you to say whether or not in regard to each prisoner the case is properly made out." Now it may be that the transcript does not repro-

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duce the exact language of the learned Chairman; indeed, we find it very difficult to think that so good a lawyer and so experienced a judge can have said to the jury that they were entitled, in considering the case of Martin, to take into account an unsworn statement made outside the court by his co-prisoner, Clapp. Mr. Harris has suggested some emendations, but on the other hand, this Court must act upon the shorthand note as it is given to it; it may be that the Crown might have discovered that there was some mistake in making the transcript, or they may have been able to produce evidence that the transcript, for some reason or other, or the shorthand note, was not accurate; but nothing of the sort, except a mere suggestion, is brought before this Court, and this Court must, we think, act upon the transcript as placed before us; but quite apart from that, even if the transcript is not precisely accurate, it is quite clear that the words of the learned Chairman must have led to some misconception in the shorthand writer's mind, and if he was misled it is quite possible the jury may have been misled too. In any case, bearing in mind that the jury had had read to them very recently, in fact at that very moment in the summing-up, the very damaging language of Clapp as against Martin, it was essential that they should have been warned in the strongest and clearest terms that they were to disregard that statement altogether and put it from their minds. We think, in all those circumstances, that there is such a probability that the jury were misled, and the position is so unsatisfactory that the conviction as regards the oil and the Austin car ought not to stand.

Then as regards the Chevrolet car, the evidence as to that is this: The car was stolen, there is no doubt about that; it was at some time or other, on some date or other, left at a garage kept by a man called Runyard; the appellant and Clapp appeared at that garage in certain circumstances which do not seem very relevant and were allowed to take it away, and then the car is next found in another garage with twenty tins of oil in it; it had been left in that other garage. Now some explanation has been given by Clapp in his statement to the police officer, and the jury may have had that explanation in their minds; Clapp, as I have said, did not give evidence; the appellant gave evidence, and he told a story which is at least possible as explaining how he may have been concerned with the car and have taken it into his possession

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along with Clapp. We think that the conviction as regards the Chevrolet car rested on evidence which in itself is unsatisfactory. We do not think the law on recent possession, and the inferences which are to be drawn from recent possession, and the nature of recent possession, were very clearly explained to the jury. We also think that the jury may have had in their minds Clapp's statement, and may have been disposed to come more readily to a conclusion as regards the Chevrolet car, because of the opinion they had been led to form with regard to the other car. We think, in those circumstances, that it would be impossible for the conviction to stand, and in the result the conviction on each count, we think, ought to be quashed, and the appellant discharged.

Conviction quashed.

H. J.

STANLEY DARLEY COULMAN.

In cross-examination of a defendant accused of a sexual offence, questions should not be asked tending to show that he is a person likely to commit the offence alleged.

If separate charges are included in the indictment, the jury should be carefully cautioned against allowing one to corroborate the other.

Appeal against conviction and sentence.

Appellant was convicted at Middlesex Sessions, on July 11th, 1927, of indecent assaults on two male persons under the age of sixteen, and was sentenced by the learned Chairman to two consecutive terms of imprisonment with hard labour, and to pay thirty guineas' costs.

Melville, K.C. (with him *D. Meston*) for appellant, who was present.

Fenton for the respondents, the Metropolitan Police.

The facts appear sufficiently from the judgment.

Melville, K.C. The grounds of appeal are threefold: the learned Chairman improperly received evidence of a "complaint"

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by one of the youths concerned to a fellow apprentice; appellant in the box was cross-examined to show his bad character—he had in fact been convicted for dishonesty—though the defence, which was a denial, had not "let in" such evidence; not a syllable about corroboration or caution was said to the jury by the Chairman, except that the one charge corroborated the other: he told them to return a general verdict, and did not discriminate between the two cases.

[He was stopped.]

Fenton. The admission of the "complaint" to Harmer, the fellow apprentice, the next morning by one of the boys cannot be justified. Harmer at once referred him to their superior, Wood, who made him write out a statement. That statement was put in only to show the consistency of the boy's story; corroboration is not actually required by law.

[SWIFT J.: This Court has laid it down that the law of "complaints" in cases of this sort is that decided in *Lillyman*, 1896, 2 Q. B. 167; 65 L. J. M. C. 195; 18 Cox, C. C. 346: C. C. R.: and *Osborne*, 1905, 1 K. B. 551; 74 L. J. K. B. 311; 69 J. P. 189; 21 T. L. R. 288; 92 L. T. 393: C. C. R.]

The cross-examination complained of did not deal with appellant's previous convictions, but to show that his memory was bad, and that he was not to be believed on oath.

The Court called attention to questions whether he was single or married, the nature and length of his tenancy of his house, and the various ventures in which he was engaged.

Fenton. Is it suggested that it was wrong to ask him whether he was single or married?

SWIFT J.: I suggest that it was very wrong. The man had done nothing to put his character in issue, and you had no business whatever to ask any questions about him the answers to which tended to make people think he was likely to have committed this crime. It may not have been wrong to ask him

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whether he was alone in the house, because the obvious object of that question was to show whether or not there were other people who might have heard or seen what was suggested to be going on, and if he were alone in the house then the story which is told by the boys might possibly be more accurate, but you are not asking him that—you are asking him something which goes to attack his character on this point. In the observations of the Lord Chief Justice in *Baldwin*, 28 Cox, C. C. 17; 133 L. T. 191; 89 J. P. 116; 18 Cr. App. R. 175: 1925: c. q., this form of question was strongly protested against—it is not right to ask whether a man is married and with a family when he is charged with an offence of this sort. If you ask a man whether he is a married man with a family, in regular work, and has a wife and three children, you are setting up his character, and you are rendering yourself liable for him to be cross-examined whether he has not been previously convicted many times. Now here your asking him "Are you a single man, and are you twenty-nine years of age?" is suggesting to the jury that he is just the sort of man who would do this sort of thing.

BRANSON J.: That is the only relevance of the question.

Fenton. I was only following out the examination-in-chief.

SWIFT J. (*a*): This appellant was convicted at the Middlesex Sessions before the Chairman on two counts of an indictment which charged him with an indecent assault upon William George Wallis on May 9th, and a like assault upon Albert Hill on May 24th. He was sentenced to ten months' hard labour on each count, the sentences to run consecutively, and he was ordered to pay thirty guineas towards the costs of the prosecution. He appeals against the conviction, and applies for leave to appeal against sentence.

At the time that these offences were alleged to have taken place, William George Wallis and Albert Hill, boys of about sixteen years of age, were employed as messenger boys by Knapp, Drewett & Company, stationers and printers, at Kingston, and

(*a*) This judgment is printed from a shorthand transcript supplied by the courtesy of the Clerk of the Peace for Middlesex.

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the appellant, Stanley Darley Coulman, was a man of twenty-nine years of age, and was the occupier of "The Orangery" at Hampton, a small place in large grounds away from the road. Now the boy Wallis says that on May 9th, between six and six-fifteen, he went to "The Orangery," taking a parcel for his employers, that when he got there he was invited in, and that whilst he was in the house the appellant committed an indecent assault upon him. He went back again, making no complaint to anybody that night, making no complaint to his father or mother or any of his relations; he went back again the next day to his employer's premises and made a statement to a boy of the name of Harmer. The way in which the evidence of that statement was elicited was, in my view, particularly unsatisfactory. No details are given; what the jury were told by Harmer and by the boy Wallis was that there had been a statement made as to indecency which went on at "The Orangery" the night before, and I have no doubt that the jury, being composed of human beings, imagined from what they were told that everything which the boy had described had been told in the statement made by him to Harmer—whether it had or not we do not know, and we never shall know—but for some reason best known to the learned Chairman of Quarter Sessions the statement was never given in evidence; it was merely described by the learned counsel for the Crown as a statement relating to indecency which had taken place at "The Orangery" the night before. There, so far as Wallis is concerned, this story ends, but he went back and spoke to the boy Hill about it, and about a week or ten days later Hill went to the defendant's premises, and he told the jury that when he went there he expected that something unpleasant might happen, and therefore he went there and told the defendant that he was nineteen years of age, thinking that it was less likely that something unpleasant might happen. In spite of his fears that something might happen, he was induced by the defendant, and apparently without much difficulty according to his own story, to go upstairs into one of the defendant's bedrooms, and there, according to his own story, a most violent assault with intent to commit sodomy was made upon him. He was, we are told, a bigger man than the prisoner; he made, according to himself, no effort whatever to escape from this outrageous assault, and when he left the premises he made no complaint to anybody until he

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got back again and told Harmer. He then sat down and wrote out his story, and by some means which, even with the assistance of counsel for the respondents, I am still unable to understand—by some means or other that story written out by him was put in evidence and was read to the jury, and it was referred to by the learned Chairman as being evidence of importance, and as corroborating the story which was told by Hill. Now with regard to the story of these two boys there is not, in our opinion, the slightest corroboration; neither are they shown to have conducted themselves in such a way as boys who, against their will, had been subjected to these indignities might have been expected to conduct themselves, nor have they ever made any complaint in the proper sense of the term, such as it was understood in *Lillyman's* case and in *Osborne's* case. They have done nothing which is not what you would expect from two boys who have concocted a story together, who, before they ever went to "The Orangery," or at any rate before Hill went to "The Orangery," had made up their minds, one or the other, as to what was likely to happen, and they took care to say what did happen; and not a single word about the danger of accepting their evidence in these matters was said to the jury by the Chairman in summing-up; not a word was said about the desirability of corroboration; not one word was said about the absence of corroboration, except that in one passage it seems to have been suggested that because two of them were telling a similar story they corroborated each other.

I do not trouble about the evidence which was given in this case on behalf of the defence. Upon both these dates there was evidence which would make it extremely doubtful in itself whether what the boys said had happened could possibly have happened, but there is no need to go into that. We are perfectly satisfied that as regards Wallis there was no corroboration at all. As regards Hill, there was not only no corroboration, but there was improper reception of evidence in that statement which was read to the jury. We do not think it satisfactory that in a trial of this sort, where there is no corroboration at all of one boy, and there is a misreception of evidence as regards the other, that a jury should be allowed to return a verdict without having been warned about the propriety and the businesslike necessity of looking to see whether there is anything outside the statement of

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these two boys which is really implicating the accused in the charges which are made against him. We think that this was a most unsatisfactory trial, and in the result we have come to the conclusion that there ought not to have been a conviction on the evidence which has been proved to have been given to the jury. The appeal will therefore be allowed, and the conviction will be quashed, and the order for costs will of course be also quashed.

Conviction quashed.

H. J.

Solicitors for Appellant—*Messrs. Tatten, Gaskill and Tatten.*

Solicitors for Respondents—*Messrs. Wontner & Sons.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SALTER.

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If in fact justices have convicted for an offence which, by s. 4 of the Vagrancy Act, 1824, 5 Geo. IV. c. 83, makes defendant a "rogue and vagabond," the omission of those words from the certificate of conviction does not disenable Quarter Sessions from dealing with him as such.

Appeal against sentence by leave of the Court.

Appellant was sentenced at the Lincoln City Sessions on July 16th, 1927, by the Recorder, as an incorrigible rogue to twelve months' imprisonment.

A. M. Lyons for the appellant, who was not present. On July 12th last, appellant was convicted of exposure under s. 4 of the Vagrancy Act, 1824, 5 Geo. 4, c. 83, and of being an incorrigible rogue, and was sent to Quarter Sessions for sentence. The sentence should be set aside as an essential condition has not been fulfilled. It is a condition precedent to any such sentence that defendant should have been previously "adjudged" to be a rogue and vagabond. This appellant has never been so adjudged and convicted, and thus never was liable to the sentence of Quarter Sessions, nor amenable to its jurisdiction. He was merely convicted of an offence under the Vagrancy Act upon a former occasion before his conviction as an incorrigible rogue.

[SALTER J.: If this is a complaint against petty sessions, has this Court jurisdiction?]

Yes. This Court, on an appeal against sentence, can review the whole of the circumstances.

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[The LORD CHIEF JUSTICE: Does not this certificate state that the prisoner came to the Quarter Sessions as an incorrigible rogue so convicted after having been previously adjudged to be a rogue and vagabond and so convicted?]

Yes; but that statement is not in accordance with the facts. The man had been convicted under s. 4 of the Vagrancy Act on January 7th, 1925, of exposure, and sentenced to a fine of 5*l.* or a month's imprisonment in default. It was an offence for which the justices who first convicted him could, had they so chosen, have adjudged him to be a rogue and vagabond, but in their certificate they expressly omitted to do so, as is shown by the copy of the record (produced).

[The LORD CHIEF JUSTICE: Is defendant not so "deemed" to be "a rogue and vagabond" under s. 5?]

No. The word "deemed" means surmised or pre-supposed, and in the statute must be read with and qualified by the preceding words. Ss. 4 and 5 of the Vagrancy Act say: "Every person committing any of the offences" in s. 3 "after having been convicted as an idle and disorderly person . . . shall be deemed a rogue and vagabond." S. 5: "Every person committing any offence against this Act which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be and duly convicted thereof, shall be deemed an incorrigible rogue within the true intent and meaning of this Act." This man never, in fact, was so adjudged and convicted: hence the Court of Quarter Sessions never had lawful power to sentence him, whatever the second conviction purported to record. The second finding was therefore bad.

[AVORY J.: Did you appear for him at Sessions and take the point there?]

I did appear, but could not take the point as the information about the certificate of conviction was not before me, and criminal jurisdiction can in no circumstances be made by consent. The learned Recorder said that I was bound by the certificate, and, indeed, I had no facts to challenge it. The discretion of the

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justices whether or not they will so adjudge and convict is established. Without such specific finding the defendant was not legally disqualified. In *W. Johnson*, 1909, 1 K. B. 439; 100 L. T. 464; 73 J. P. 135; 22 Cox, C. C. 43; 25 T. L. R. 229; 53 S. J. 288; 78 L. J. K. B. 290; 2 Cr. App. R. 13: sent. q., it is made clear that to justify a conviction of a person for being an incorrigible rogue he must have been previously adjudged to be a rogue and vagabond and duly convicted thereof.

[The LORD CHIEF JUSTICE: Of what do you say this man was convicted?]

Of being a vagrant. Being found guilty of exposure, he was convicted of nothing more than that offence under the Vagrancy Act. The later conviction cannot remedy the defect. My case is expressly supported by *T. Evans*, 1915, 2 K. B. 762; 84 L. J. K. B. 1603; 11 Cr. App. R. 178: s. q., which re-asserts part of Lord Alverstone's judgment in *W. Johnson*. "... if the section," *i.e.*, s. 5 of the Vagrancy Act, 1824, "stopped after the words 'rogue and vagabond,' there would in this case have been an offence committed for which the appellant might have been convicted as an incorrigible rogue, but s. 5 goes on to say, 'such person having been at some former time adjudged,' &c., it follows, therefore, that in order to justify a conviction of a person of being an incorrigible rogue, he must have been previously adjudged to be a rogue and vagabond and duly convicted thereof. The appellant," Lord Alverstone continued, "has never been adjudged to be a rogue and vagabond, though he might have been on the occasion of the conviction on December 12th, 1907." This manifestly acknowledges the principle of discretion in the justices; for twice being an idle and disorderly person they may deem a defendant also a rogue and vagabond. This finding is a separate classification, and to exist must be definitely so found. The words "adjudged so to be and duly convicted thereof" refer to the classification, which cannot be said to be automatic. To create this legal status the justices in petty sessions must make a specific record, otherwise the finding does not exist. Counsel also referred to *Ex parte Read*, 22 J. P. 271: 1858, as to some extent supporting his contention.

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Although s. 17 of the Vagrancy Act, which set out the precise form of conviction, is no longer law, the material words of the Act remain and convictions now embody them. On conviction for such an offence the justices are not bound to judge him a rogue and vagabond, and thus qualify him on a second conviction to become an incorrigible rogue. It is open to them expressly to omit this and leave his status legally unaltered. That is what happened in this case, and consequently the sending to Sessions here (which itself is optional) was founded on misconception. That being so the sentence could not properly be passed by Quarter Sessions.

The LORD CHIEF JUSTICE: This case does not raise the same point as that in *W. Johnson* (above). It may hereafter be necessary to consider Lord Alverstone's remarks *obiter* on s. 5 of the Act of 1824, but here *ex concessis* appellant was "adjudged" to be guilty of an offence which by the statute makes him a rogue and vagabond. But it is contended that that is not sufficient because the term "rogue and vagabond" is not used in the certificate of conviction. That argument fails not on account of the form of the certificate, but because the justices in fact treated appellant as a rogue and vagabond, as having done an act for which the statute itself "deemed" him to be a rogue and vagabond. The Court heard argument on the point only to see whether it affected sentence, and it does not. But leave having been given, the conviction may date from August 18th.

Appeal dismissed.

H. J.

Solicitors for Appellant—*Nelson and Jackson*, Lincoln.

GEORGE HENRY.

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On an appeal against a term of preventive detention the Court may proprio motu *reduce the primary sentence.*

Appeal against sentence.

Appellant pleaded guilty on July 27th, 1927, at the County of London Sessions, to housebreaking, and was convicted of being a habitual criminal, and was sentenced by the Deputy-Chairman to three years' penal servitude and five years' preventive detention.

Arthur Capewell for the appellant, who was present. It is true that appellant's record was very bad, but the learned judge did not sufficiently call attention to the fact that they must consider whether at the moment he was leading a criminal life. Now during his interval of seven months' liberty he was actually at work for four and a half, and only lost his jobs because the employers had no more work—one came forward and said that he would take him on again. He cited *Norman*, 1924, 2 K. B. at 331; 93 L. J. K. B. 883; 131 L. T. 29; 68 S. J. 814; 27 Cox, C. C. 621; 88 J. P. 125; 40 T. L. R. 693; 18 Cr. App. R. 81: c. q.; further, that in the circumstances the sentence of three years' penal servitude was too heavy, and should be reduced to one of hard labour for a shorter period.

E. Fulton for the Crown.

The Court, in view of the fact that appellant had shown a desire to work, and that there was a *remanet* of a former sentence of preventive detention, thought that the term of penal servitude might be reduced to twelve months' imprisonment with hard labour (from the date of conviction), and therefore the term of preventive detention automatically was removed.

Sentence reduced.

Solicitors for Appellant—*Ramskill, Olley & Co.*

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Salter J.

JAMES BOOTH.

Sentence reduced in view of youth and previous good character.

Appeal against sentence by leave of the Court.

Appellant pleaded guilty on July 21st, 1927, at the Central Criminal Court to wounding with intent to do grievous bodily harm, and was sentenced by Branson J. to twelve years' penal servitude.

Appellant was present.

The Lord Chief Justice: The Crown accepted the plea, and the count for wounding with intent to murder was given up by the prosecution. The appellant is twenty-three years of age and has hitherto been of good character. The sentence would have been appropriate on the first count. In the circumstances the sentence is reduced to one of five years' penal servitude, to run from the date of conviction.

Sentence reduced.

H. J.

OSCAR DAWKINS.

Sentence reduced in view of youth and good character.

Appeal against sentence by leave of the Court.

Appellant was convicted on July 19th, 1927, at the Central Criminal Court of possessing firearms with intent to endanger life (and acquitted on a count for attempting to discharge a loaded pistol with intent to murder), and was sentenced by Branson J. to five years' penal servitude.

L. Vine for the appellant, who was present. Appellant is a respectable man; this is his first offence. The charge arose out of a scuffle in a café, in which appellant was the only person hurt, and that seriously; he had had provocation.

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The LORD CHIEF JUSTICE: The firearms found were an automatic pistol and ammunition—in contravention of the Firearms Act. Perhaps the jury thought that appellant did not attempt to discharge the pistol, but had provided himself with it in case of need. We give effect to that view, and to the acquittal on the major charge, as he is a young man and of good character, by reducing the term to twelve months' imprisonment with hard labour.

Sentence reduced.

H. J.

Solicitor for Appellant—*A. Ross Dagg.*

GEORGE WATSON.

Severity of sentence.

Appeal against sentence by leave of the Court.

Appellant was convicted on August 6th, 1927, at the Middlesex Sessions of sacrilege, and was sentenced by the Chairman to five years' penal servitude.

Appellant in person.

The LORD CHIEF JUSTICE: This man is seventy-two years of age. There are twenty convictions against him. In this case he stole eightpence from a church. Some of his previous sentences were for long terms, in circumstances in which they would not be inflicted to-day. His long terms were not enough to justify so severe a sentence for stealing eightpence, but the learned Chairman said that had it not been for the fact that this Court had reduced a term of five years' penal servitude inflicted on him by the Chairman in 1923 for stealing a clock, to three years, he would still have been in prison and unable to commit this sacrilege. It is not easy to follow this reasoning, but it seems to imply that

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GEORGE WATSON.

Hewart L.C.J.

anyone imprisoned for crime should be sentenced for life. The term is reduced to nine months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

H. J.

CYRIL VERNON TROTT.

Mitigation of sentence, despite a bad record, in view of periods of honest work.

Appeal against sentence.

Appellant pleaded guilty at the Oxfordshire Sessions on the 4th of October, 1927, of larceny in a dwelling-house and stealing property valued at 54*l*., and was sentenced by the Chairman to five years' penal servitude.

G. St. J. Macdonald for the appellant, who was present. His record is certainly bad, but not sufficient credit was given to the fact that for two years he has been at work.

The LORD CHIEF JUSTICE: The reason given by the Court for this sentence was that appellant was leading a persistently dishonest life. This was to overlook a period of two years' work, as the police admitted, and certain other intervals free from crime —some considerable and with success. The term seems to have been inflicted under a misapprehension. It is reduced to eighteen months' imprisonment with hard labour.

Sentence reduced.

H. J.

Solicitor for Appellant—*Bruce Searl.*

BARNETT MOSCOVITCH.

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Salter J.

To prove a valid marriage in a foreign country it is not sufficient to call experts on the religious or ecclesiastical ceremonies, there must be proof of the marriage being valid by the law of the State.

Appeal on certificate.

Appellant, who was not in custody, was convicted of bigamy on September 16th, at the Central Criminal Court, but the Recorder postponed sentence in view of a point of law that had arisen.

The bigamous marriage charged was one in England in 1925: the prosecution alleged that appellant had been legally married in 1881 to a Jewess in Lodz, Poland, then part of Russia, according to Jewish rite, and that the marriage still subsisted: they lived together there and in England for some years. The defence set up was that that marriage was not properly proved, and that, in fact, it was not good in Russian law at its date. The evidence for the prosecution was that of the "first wife" and a Rabbi, the Rev. H. M. Lazarus, who was Ecclesiastical Assessor of the Court of the Chief Rabbi in London. No certificate of marriage was produced. It was admitted, on the evidence of the Rabbi, that the marriage was good in Jewish law.

Hyman Harris for the appellant. The first marriage had not been properly proved at the trial. Merely to prove that it was a regular Jewish marriage is insufficient. A Jewish marriage celebrated abroad is on precisely the same footing as any other foreign marriage. Expert evidence must be adduced to show that the marriage in question was recognised by the law of the country of its celebration. *Mark Mahommed Naguib,* 1917, 1 K. B. 359; 86 L. J. K. B. 709; 116 L. T. 640; 81 J. P. 118; 25 Cox, C. C. 712; 12 Cr. App. R. 187. In that case Reading L.C.J. said: "We are clearly of opinion that a claimant relying on a foreign marriage, or the Crown in a prosecution for bigamy alleging an earlier marriage in a foreign country, must adduce expert evidence to prove the validity of the marriage according to the law of the foreign country. . . . In the present case, as there is no proper evidence of the essential requisites of a marriage in Egypt, and nothing to show that the alleged marriage was a

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valid marriage according to the law of that country" [as the appellant contended] "the appeal fails." No proper expert evidence was adduced at the trial. The Rabbi called at the trial to prove that the marriage was valid according to Russian law could not be described as a person *peritus virtute officii*. He had neither the knowledge nor competency required. All he said was that the marriage as described by the witnesses was a good marriage according to Jewish law, but in cross-examination he said frankly that he knew nothing about the Russian law applicable. He had himself merely lived in Poland from the age of twelve to that of nineteen before the Revolution. According to Russian law a Jewish religious marriage would not be recognised as a proper legal marriage, because by that law, for such a marriage to be valid, it must be registered before an official [mayor or Burgomaster] of the town where it took place, and, further, it must be before the State-paid Rabbi of the district. Unless these formalities were carried out, there was no valid marriage according to the law of Russia, but the marriage would certainly be binding on a Jew—he could not marry after. In *Savage*, 13 Cox, C. C. 178, 1876 (bigamy), Lush J. refused to accept as conclusive the evidence of a Roman Catholic priest who had previously performed similar ceremonies in Scotland on the Scots law of marriage: "in an indictment for bigamy everything must be proved strictly"; there defendant admitted that he had been married in Scotland. He relied on the *Sussex Peerage Case*, 11 Cl. & F. 85 (at 133—4); 8 Jur. 793: 1844, where the question who is *peritus virtute officii* to declare foreign law is discussed.

In *Povey*, 1 D. & P. C. C. 32; 17 Jur. 120; 1 W. R. 40; 22 L. J. M. C. 19; 6 Cox, C. C. 83: 1852: c. q., to prove a Scottish marriage a sister of the "second wife" was called, and deposed that she had been present at a ceremony of marriage between her sister and defendant in a private house performed by a minister of the congregation, that all marriages, including her own, were so solemnised in that country, and that the two had lived together as man and wife after the ceremony; there Jervis C.J., with the concurrence of four other judges, said: "There may be certain cases, perhaps, in which it may not be necessary to have a lawyer to give evidence, but the Court is clearly of opinion that some witness conversant with the Scottish law of marriage should have been called on the part of the Crown. . . .

What the witness who was called [the sister] says—even supposing her a competent witness in such a matter—does not amount to any proof of a marriage in fact." An unreported case (referred to in 33 Law Journal Newspaper, 239 in 1898: *Weinberg*) was exactly on all fours with this, and the Crown had suggested to the Recorder that an acquittal (of bigamy) should be directed, and this was done; the learned judge below in this case had seen this report.

Frederick Levy for the respondents, the Police. If the Court is satisfied that the Rabbi who gave evidence in the Court below was *peritus virtute officii*, then the conviction should be upheld. On the evidence given the Rabbi was skilled in the Jewish law, and although not in Russian law generally, was sufficiently acquainted with the Russian law appertaining to Jewish marriage and divorce to be enabled to give an expert opinion.

The case of *Naguib* (above) was a different case, as in that case no evidence of any expert was given on any point (the defendant clearly not being one); further, in the judgment of Reading, L.C.J. the words "we are clearly of opinion that it is necessary to adduce expert evidence in order to prove a foreign marriage" refer to the specific defect in that case, namely, the absence of any expert evidence at all.

Shapiro (Central Criminal Court before Mr. Commissioner Atherley-Jones, Dec. 10th, 11th, 1925, unreported) was precisely a similar case to the case before the Court to-day, and the defendant was convicted and sentenced to six months' imprisonment. Further, in *Patrick Griffin*, 14 Cox, C. C. 308: 1879: Irish Court for Crown Cases Reserved, the headnote says: "In a case of bigamy a marriage . . . according to the rites of the Roman Catholic church in a foreign State is presumed to be good without proof of the law of that foreign State relating to marriage." There Lawson J. said of a normal Roman Catholic marriage (both parties being of that faith) in Illinois, only proved by the woman there married: "We should presume, in the absence of evidence to the contrary, that the clergy were acting according to law, and that they solemnised a valid marriage."

[The LORD CHIEF JUSTICE: But in *Griffin* no question arose about the first marriage—it was not denied that it was valid.)

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BARNETT MOSCOVITCH.

Hewart L.C.J.
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In *B. Hammer*, 1923, 2 K. B. 786; 92 L. J. K. B. 1045; 129 L. T. 479; 27 Cox, C. C. 458; 87 J. P. 195; 68 S. J. 120; 39 T. L. R. 670; 17 Cr. App. R. 142: c. q., Sankey J. said: "In our view the validity of a marriage under Jewish and Russian law is a question of fact."

The LORD CHIEF JUSTICE: The learned Recorder granted a certificate in this case on the point whether the marriage in Russia was properly proved. There was evidence of the usual ceremonial at Jewish marriages having taken place, but the only witness called to prove the validity of that marriage in Russian law (at the material date) was a London Rabbi, who admitted that, though he had been brought up in Poland, he could not say whether it was so valid—all he could affirm was that it was binding on Jews according to Jewish law. In *Naguib* (above), Atkin J. said: "the *onus* is on the accused to prove a valid marriage according to foreign law. He must prove, first, that there was a marriage, and secondly, that it was valid according to foreign law" (12 Cr. App. R. 189). That case and *Povey* show that the "expert" evidence required is either that of a professional lawyer or of one who is *peritus virtute officii*. Here the witness for the Crown was neither. Those two cases sufficiently state the law. The case of *Griffin* (above) does not affect this case. We do not think that there was any evidence in this case to go to the jury and the appeal is allowed.

Conviction quashed.

H. J.

Solicitors for Appellant—*C. V. Young & Co.*

Solicitors for Respondents—*Messrs. Wontner & Sons.*

EDWARD THOMAS REYNOLDS.

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Hewart L.C.J.
Avory J.
Salter J.

In a summing up in a trial for guilty receiving, the jury must be emphatically warned against convicting on the uncorroborated evidence of the admitted thief.

Appeal against conviction and sentence by leave of the Court.

Appellant was convicted on September 27th, 1927, at the Stoke-on-Trent City Sessions, of receiving stolen property with guilty knowledge, and was sentenced by the Recorder to three years' penal servitude.

H. H. Maddocks for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The conviction rests solely on the uncorroborated evidence of the convicted thief, one Ward. Jewellery stolen last May from a pawnbroker's shop in Hanley was discovered in September in a derelict oven in a bakehouse attached to appellant's premises, to which, it was proved, anyone could get access. Ward deposed that he had sold £25 worth of it to appellant for ninety shillings, but the latter's case was that a day before the discovery he had detected Ward in committing another crime (as Ward knew), for which he was arrested, and that to discredit him Ward had put the jewellery where it was found and had then informed the police. There was no other proof of appellant's possession, and the Recorder had not sufficiently—according to *Baskerville,* 1916, 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. 453; 80 J. P. 446; 25 Cox, C. C. 524; 60 S. J. 696; 12 Cr. App. R. 81; and *J. G. Beebe,* 19 Cr. App. R. 22: 1925: c. q.—warned the jury against the want of corroboration. He assumed the guilt of appellant. Further, the Recorder misstated appellant's explanation: he said that if appellant's story was true, Ward must have kept the jewellery for three months, and then placed it in the bakehouse to spite appellant, although appellant had done nothing to spite him. That this misstatement was fatal to appellant may be gathered from the questions asked by the jury before returning their verdict, and from the answers to the effect that the jewellery, when found, was damp and wrapped in a newspaper of May 28th, 1927.

S. A. H. Burne for the Crown. It must be admitted that the

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EDWARD THOMAS REYNOLDS.

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warning was not express, but the Recorder did say, "Ward is a thief, and you must look on his evidence with considerable suspicion." Moreover, the questions put by the jury after the summing-up showed that they were alive to the necessity for corroboration. The jewellery, when found, was wrapped in brown bags such as were found in numbers in the bakehouse, and in a newspaper dated May 28th. All this was legitimate evidence for the jury.

The LORD CHIEF JUSTICE (after reciting the facts): Ward might well have good reason to attack the appellant when he knew that the latter might incriminate him for the later offence. It was, therefore, more than ever essential to warn the jury of the danger of the thief's evidence, unless it is corroborated in some material particular implicating the accused. Later words even subtracted from the value of such warning as there was, for the scheme of the summing-up as a whole assumes the guilt of the accused. The jury were not told that they must be satisfied of appellant's possession, that is, of his knowledge thereof, nor of his *guilty* knowledge. The appellant's mere suggestion that Ward had played a trick on him was treated as a lie, and no doubt the jury were impressed by it. The date of the newspaper, too, was used against the appellant. The conviction cannot stand.

Conviction quashed.

H. J.

VICTOR GEORGE ETTRIDGE.

Severity of sentence.

Appeal against sentence by leave of the Court.

Appellant (who was present) pleaded guilty at the Essex Sessions, on September 18th, 1927, to office-breaking and stealing a flask, a revolver, a sextant, &c., and was sentenced to twelve months' imprisonment with hard labour. Three days after the theft he gave himself up to the police at Billericay. He was forty-seven years of age, and in 1911 he served a sentence for burglary, but since then he had worked for long intervals

(1923—6), and had made a real endeavour to get fresh jobs; he had now been detained nearly two months.

In view of these facts the Court reduced the sentence to three months' imprisonment with hard labour, to run from October 8th.

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VICTOR GEORGE ETTRIDGE.

Hewart L.C.J.
Avory J.
Salter J.

Sentence reduced.

H. J.

DAVID DANIELS.

Conviction quashed on the ground that the verdict was against the weight of evidence.

Appeal against conviction.

Appellant was convicted on September 28th, 1927 (after a five days' trial), of receiving stolen property with guilty knowledge, and was sentenced by Mr. Commissioner Atherley-Jones to nine months' imprisonment in the second division.

Originally there were four defendants. Appellant was acquitted on one count for receiving, but was convicted on one for receiving aeroplane fittings, on a count for stealing which one Lupson was acquitted (the Crown having withdrawn that charge).

Keeves for appellant, who was present. The verdict was against the weight of evidence, and defendant's case should not have been allowed to go to the jury, and ought to have been put to them differently.

It was common ground that appellant, who was a metal dealer at Millwall, had had many regular business dealings with Lupson before that on this occasion; on September 22nd he had paid Lupson by cheque a fair price for the fittings; that the transaction was properly invoiced and entered in his books; and that the stuff was lying open in his yard (some of it in sacks with the owners' names on them), and was at once shown to the police when they made enquiries. The only discrepancy was at what point appellant had said to the police officers, when they mentioned that they had arrested Lupson for the larceny, "I knew he was a rogue and a thief, I've known him for eleven years, I believe he has stolen goods before." Appellant had himself once suffered from Lupson's dishonesty.

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DAVID DANIELS.

Hewart L.C.J.
Avory J.
Salter J.

At the trial it was twice submitted to the learned judge that there was no case to go to the jury against appellant—that is on both the counts, the one of which he was acquitted, and on this of which he was convicted—and on both occasions he said that he was almost inclined to agree.

In answer to the Court, counsel said that in this submission the two counts were not distinguished. His suggestion on the 22nd September that Lupson was a thief and that he knew it was nothing more; in any case, it was no reason why he should not have proper commercial transactions with him.

[SALTER J.: Have you ever known a receiving case in which a fair price was paid?]

No.

[The LORD CHIEF JUSTICE: The situation at one point was that Lupson was no longer charged with stealing the goods which appellant was charged with receiving?]

Yes. It came to this, that on the day of the theft appellant is in possession of the stolen articles. When the police informed him that they were stolen he said: "In this business we cannot afford to choose." No doubt it was on this observation that the jury came to the conclusion that he was *knowingly* buying from a man whom he had himself described as "a rogue and a thief."

Byrne for the Crown.

The LORD CHIEF JUSTICE: The facts of this case were never put quite clearly to the jury; nor was it pointed out that they are equally compatible with innocence and with guilt. The conversation with the police officers might fairly be due to the fact that the appellant had forgotten Lupson's previous misdeed, and that his suspicion had been allayed till it was renewed by the officer's information. There was, however, a direct conflict of evidence between the police and the appellant on that point, and in the way the case was put to the jury they might think that if they accepted the officer's evidence it followed that the appellant had guilty knowledge, but that was not so. No clear distinction was drawn by the learned judge between the two counts (the one of

which the appellant was acquitted and that on which he was convicted), and on the latter the evidence is so slight that the conviction cannot be supported.

Conviction quashed.

H. J.

Solicitor for the Appellant—*W. Daybell*, Stratford.

WILLIAM LUTHER CHARLES.

Severe sentences should not be inflicted for comparatively trivial offences, even though the offender has earlier been convicted of serious crime.

Appeal against sentence.

Appellant pleaded guilty at the Oxfordshire Sessions on October 4th, 1927, of pavilion-breaking, and was sentenced by the Chairman to five years' penal servitude.

Appellant was not present.

He had broken into a golf house and had stolen and consumed drink, and food, and cigars to the value of about thirty shillings; he was found in the building the next morning in a semi-intoxicated condition.

The LORD CHIEF JUSTICE: Appellant is forty-two years of age; before the war he had several convictions, some for the same kind of offence as this, but during the war and afterwards he had an excellent record of service and character in the army, and was only discharged as unfit for further service. This Court has often declared that it disapproves of long sentences for comparatively slight offences merely because the defendant has committed serious crimes in early life. Here the interval was very long, and appellant's record is creditable. The sentence is reduced to six months' imprisonment with hard labour from the date of conviction.

Sentence reduced.

H. J.

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31 *October.*

Hewart L.C.J.
Avory J.
Salter J.

ALBERT EDWARD USHER.

Mitigation of sentence in view of previous honest work and the certainty of immediate employment.

Appeal against sentence by leave of the Court.

Appellant pleaded guilty, at Middlesex Sessions, on September 27th, 1927, to shopbreaking (two counts) and of factory breaking, and was sentenced by the Deputy-Assistant-Chairman to two consecutive terms of six months' imprisonment with hard labour on the former and a similar concurrent term on the latter.

Horton-Smith for the Crown called Detective-Inspector Sandles, who informed the Court of the appellant's antecedents: he is just over twenty years old; an old employer will probably find work for him.

Adjourned for enquiries.

7 *November.*

The employer in question was not present, but the Court was satisfied that he would employ appellant forthwith. Mr. Wilson, Court missionary, undertook to see that this promise was carried out.

Appellant was accordingly bound over in his own recognisance of £5.

Sentence reduced.

H. J.

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31 *October*

HENRY JACKSON.

Sentence reduced in view of a definite offer of employment.

Appeal against conviction and sentence by leave of the Court.

Appellant was convicted on October 5th, 1927, at the Essex Sessions, of larceny, and was sentenced by the Deputy-Chairman to six months' imprisonment with hard labour.

Seaton for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was indicted with one Harris, who was acquitted. The jury ought to have been directed that if they were not sure which of them (if either) committed the theft they should acquit both, but they were told "You must treat each case separately on its merits."

[The LORD CHIEF JUSTICE: The judge said positively "These men are accomplices."]

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31 *October.*

HENRY JACKSON.

Hewart L.C.J.
Avory J.
Salter J.

Appellant is aged twenty-nine.

Tindal Atkinson for the Crown. While the expression "accomplices" is open to criticism, when it is read with the context, this part of the summing-up was, in fact, in appellant's favour.

AVORY J.: The expression "accomplices" is unfortunate, but there was ample evidence to convict. It seems, however, that one of appellant's employers is willing to offer him work: so there will be an adjournment to make enquiries.

7 *November.*

AVORY J.: An old employer is willing to take appellant back at once. The Deputy-Chairman overlooked the fact that after his last release from prison he had been employed by this gentleman for a year and a half (which the Deputy-Chairman took to be a half year) and behaved well. He has been in custody four months and the offence was not very serious. On the usual undertakings, the sentence will be reduced to one of four months' imprisonment with hard labour.

Appellant will be bound over for twelve months to come up for judgment, &c. in his own recognisance of £5, one condition being that he proceeds at once with the sergeant in the case to his new employment.

Sentence reduced.

H. J.

ROBERT IRVING.

Sentence not warranted by law formally corrected by the Court.

Applicant was convicted on October 7th, 1927, of housebreaking and of an attempt to break into an office, at the Bolton Borough Sessions, and was sentenced for each offence to two terms of three years' penal servitude (concurrent). He applied for leave to appeal against conviction and sentence.

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7 *November.*

ROBERT IRVING.

Hewart L.C.J.
Avory J.

The Court pointed out that there was no power to inflict penal servitude for the attempt charged, and varied one term to twelve months' imprisonment with hard labour.

One sentence reduced.

H. J.

SIDNEY WILLIAM PAWSON.

Severity of sentence.

Appeal against sentence.

Appellant pleaded guilty on October 12th, 1927, at the Derbyshire Sessions, to attempted arson (of haystacks), and was sentenced to five years' penal servitude.

Appellant in person.

The Court, in view of appellant's previous character (though some time ago he had been thrice convicted of small larcenies) as a good hard-working man, and of the facts that he recently had great domestic trouble, that he had a severe blow on the head, that he had no grudge against the owner of the haystacks and had expressed his contrition, reduced the term of penal servitude to three years, to run from the date of conviction.

Sentence reduced.

H. J.

MARY O'DONOGHUE.

On the question whether a child is "newly-born" within 12 & 13 Geo. V. c. 18, the Infanticide Act, 1922, it is for the judge to rule whether there is evidence to go to the jury.

Appeal against conviction.

Appellant was convicted on October 13th, 1927, at the Central Criminal Court, of the murder of her infant, thirty-five days old, and was sentenced to death by Talbot J. The sentence had been commuted by the Crown to one of penal servitude for life.

Mitchell Banks, K.C. (with him *Seuffert*), for the appellant, who was not present. The sole ground of appeal was on a point of law. S. 1 (1) of 12 & 13 Geo. V. c. 18, the Infanticide Act,

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MARY O'DONOGHUE.

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runs: "Where a woman by any wilful act or omission causes the death of her newly-born child, but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, be guilty of felony, to wit, of infanticide": the punishment is that of manslaughter. Sub-s. (2) is: "Where upon the trial of a woman for the murder of her newly-born child, the jury are of opinion that she by any wilful act or omission caused its death, but that at the time of the act or omission she had not fully recovered from the effect of giving birth to such a child, and that by reason thereof the balance of her mind was then disturbed," they may return a verdict of infanticide.

It is submitted that Talbot J. ought to have directed the jury that they had the power to find "infanticide." Counsel recounted the admitted facts, which showed that appellant was in great distress at the time of the birth for some weeks from poverty and malnutrition, and had only just obtained employment when she killed the child. The learned judge had ruled against counsel for the Crown that there was evidence of insanity to go to the jury, but none of "infanticide": there was between insanity and sanity a degree of mental derangement which the medical authorities called "puerperal" which might appear physically for any period from two to six weeks after childbirth, to meet which condition the statute was designed.

An essential point was that the learned judge had ruled that the infant was not "newly-born" within the meaning of the Act, but it was stated in the 7th edition (1927) of Jervis on Coroners, p. 161, that "in 1924, at Guildford Assizes, Avory J. held that a child three weeks old fell within the definition——"

[AVORY J.: That is a mistake, I have always entertained one view on the point, and I never so held (*a*).]

"and at Reading Assizes on October 16th, 1923, where Mary

(*a*) On November 21st the learned judge stated in Court that he had consulted his note of this case—*R.* v. *Clifton*—and had had enquiries made about it, and it appeared that on July 1st, 1924, the prisoner was found to be insane and unfit to plead: hence the point could not arise: her infant had been described in the Calendar as "three weeks" old.

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MARY O'DONOGHUE.

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McConnell was charged with the murder of her child born April 28th, 1923, and killed by her on June 11th following, Shearman J. held that the jury could find a verdict of infanticide." Counsel cited Quain, Medical Dictionary (3rd ed.), p. 759, on the question of the maximum period.

[AVORY J.: Is it to be left to the jury in every case to decide whether the child was "newly-born" or not?]

Here the learned judge ought to have left appellant's state of mind to the jury and perhaps they ought to decide both that and whether the child was "newly-born."

At any rate, Talbot J.'s view was too narrow.

Sir Travers Humphreys for the Crown was not called upon.

The LORD CHIEF JUSTICE (*a*): This appellant was convicted at the Central Criminal Court for murdering her infant son on the 21st day of September last. She was sentenced to death, but an order for detention of the appellant in penal servitude for life has since been substituted for that sentence. The appellant now appeals against conviction.

The facts of the case, a sad case, were never in dispute; but it was urged that under s. 1, sub-s. (2) of the Infanticide Act of 1922 the infant who was killed was a newly-born child, and, at the time of the act of killing, the mother had not fully recovered from the effect of giving birth to that child, and that by reason thereof the balance of her mind was then disturbed. The contention, and the only contention, on behalf of the appellant before this Court is that the jury should have been so directed by the learned judge as to have at any rate the opportunity of returning a verdict of infanticide in lieu of the verdict of murder. The sole ground of appeal, although it is expressed in two slightly different ways, is, as has been frankly admitted, that the learned judge was wrong in law in holding that the case did not come within the terms of the Infanticide Act.

With regard to the melancholy facts of the case, it is enough for the present purpose to mention that the baby was born during

(*a*) This judgment is printed from a transcript of a *verbatim* report supplied by the courtesy of the Director of Public Prosecutions.

the night of the 19th of August last, and that, according to the uncontradicted evidence, the mother, the appellant, took that baby's life on the 21st day of September; so that at the time of the act of killing the child had lived from the 19th day of August until the 21st day of September, that is to say, somewhat over a calendar month.

In that state of the facts the learned judge held that, in view of that lapse of time, it was not possible to find that that infant was a newly-born child within the meaning of this statute; or, in other words, to expand the proposition to its full length, he held that there was no evidence fit to go to the jury upon which they might be asked to hold that this was a newly-born child. He did not purport to define the term "newly-born child"; what he did was to rule that a child who had lived from the 19th of August until the 21st of September could not be found to be a newly-born child within the meaning of this section.

The argument which has been urged on the other side is to this effect, that this statute is contemplating an act committed by a mother at a time when she has not fully recovered from the effects of childbirth, and when, for that reason, she is in a state of mental disturbance; and that the real question is, not how many days ago or how many weeks ago the child was born, but whether the child who is killed is the child from the effects of whose birth the mother accused had not yet recovered at the time of the committing of the act.

In our opinion, to read the section in that way is to misread it; it is to eliminate from the section the epithet "newly-born." If the argument for the appellant were right, if, in other words, this statute meant what on behalf of the appellant it is urged that this statute does mean, the natural and ordinary way of expressing that meaning would have been this: "Where a woman, by any wilful act or omission, causes the death of her child, but at the time of the act or omission she had not fully recovered from the effects of giving birth to such child, and by reason thereof the balance of her mind was then disturbed," then certain consequences shall follow. But the Act does not say that. Whether you look at sub-s. (1) or sub-s. (2) or sub-s. (3), wherever this child is referred to, the expression "her newly-born child" is found. In other words, in order that the conditions of this section may be fulfilled, there must be at least three co-existing circumstances: first, the child must be the child of

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MARY O'DONOGHUE.

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that mother; secondly, the child must be her newly-born child; and thirdly, at the time of the act or omission she must not have fully recovered from the effect of giving birth to that child, and by reason thereof the balance of her mind must then have been disturbed. But it is crucial in the matter that, while conditions 1 and 3 are fulfilled, condition 2 is also fulfilled and the child is a newly-born child. In other words, the argument for the appellant really treats the section in every one of its parts, 1, 2 and 3, as if this expression "newly-born" were otiose and meaningless.

We do not propose to undertake the task, which does not arise, of defining this expression "newly-born child." It is enough for the purposes of the present appeal to say that Mr. Justice Talbot made no error in law in holding, with reference to a child of more than a calendar month of age, that there was no evidence upon which he could invite or permit a jury to find that that child was newly-born within the meaning of the statute.

In those circumstances, this appeal fails.

There is, however, another matter to which it may be convenient briefly to refer. This appellant made a statement, and in that statement she showed that she was well aware of all the antecedent and surrounding circumstances. That statement, which is set out in full in the transcript, begins by saying: "I have been informed by the police" so and so, "and have been cautioned that I need not say anything about it unless I wish, but in spite of that I wish to make a voluntary statement concerning it." And at the close of that statement, before her signature, she adds these words: "This statement has been read over to me and it is true." Now, in view of the fact that accused persons frequently deny that they have been cautioned when in fact they have been cautioned, or deny that the statement has been read over to them when it has been read over to them, we think that no objection can be taken to the practice which was followed in the present case.

The appeal is dismissed.

Appeal dismissed.

Solicitors for Appellant—*Messrs. J. H. MacDonnell & Co.*

H. J. .

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SALTER.

TERRY HINKS.

1927
21 *November.*

Severity of sentence.

Application for leave to appeal against sentence (refused by the single judge). The Court granted the application, and later in the day, "no objection being raised" by the Crown, it dealt with the appeal.

Appellant, who was not present, pleaded guilty, at the Cheshire (Knutsford) Sessions, on October 17th, 1927, to larceny, and to obtaining food and lodging by false pretences, and was sentenced, by the Chairman, to two years' imprisonment with hard labour. There were three previous convictions, two for similar offences, and one for forgery, and another case of larceny was taken into account in the sentence appealed against. It appeared that since his last release in March, 1927, appellant had had employment, which he had lost through no fault of his own. In all the circumstances the Court reduced the term to twelve months, to run from the date of conviction.

Sentence reduced.

H. J.

GUSTAV FLEMMER.

Severity of sentence.

Appeal against conviction and sentence by leave of the Court.

Appellant (who was present) was convicted, on October 3rd, 1927, at the Manchester City Sessions, of common assault and

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21 *November.*

GUSTAV FLEMMER.

Hewart L.C.J.
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Salter J.

indecent assault, and was sentenced, by the Recorder, to twelve months' imprisonment with hard labour.

Maddocks, for the Crown, was not instructed to argue in support of the sentence.

The LORD CHIEF JUSTICE: It was common ground that no violence was committed by appellant, and that the assaults were of a trifling nature. The term is reduced to six months, to run from the date of conviction.

Sentence reduced.

H. J.

CHARLES ROATH.

Severity of sentence.

Appeal against sentence.

Appellant (who was present) pleaded guilty, on October 18th, 1927, at the Hampshire Sessions, to office breaking, and stealing to the value of £4 10*s.*, and was sentenced, by the Chairman, to eighteen months' imprisonment with hard labour.

SALTER J.: Appellant was convicted of similar offences in 1921, 1922 (three times), and 1923, and was ultimately sent to Borstal. In this case he gave information which led to the recovery of a clock he had stolen. He is twenty-one years of age. In view of the small value of what he stole and of his youth, the term is reduced to nine months, to run from the date of conviction.

Sentence reduced.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE BRANSON.

EDWARD LLOYD.

1927
12 *December.*

When the defence raised is insanity, the jury should not be encouraged to find guilty (simply) with a recommendation to mercy.

In order to substitute a "special" verdict this Court must be satisfied that appellant was insane at the material time.

Application for leave to appeal (treated as a final appeal).

Applicant was convicted before Roche J. at Durham Assizes, on November 16th, 1927, of murder, and was sentenced to death.

Archibald Wilson for the applicant (under s. 10 of the Criminal Appeal Act, 1907), who was not present. The defence raised at the trial was that of insanity. There was ample evidence on which the jury could have found that the accused was insane; but in his summing-up the learned judge told the jury that it would be more beneficial to the accused if they returned a verdict of guilty, accompanied by a recommendation to mercy. He further said that he, as the presiding judge, would be asked whether he agreed with that recommendation, and that he would be favourably disposed towards it. But for this alternative suggested by the learned judge, the jury would in all probability have returned the special verdict of guilty but insane.

Paley Scott for the Crown. If the summing-up be regarded as a whole, the defence of insanity was fairly and properly left to the jury. Granting that there was here some evidence of insanity, there was also evidence that pointed to a contrary conclusion. The conduct of the accused before and after the crime indicated that he was not, in the legal sense, insane at the time

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EDWARD LLOYD.

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when he committed it. No medical evidence was called at the trial to prove that the accused was insane.

[AVORY J.: The evidence of ordinary witnesses is often more useful than that of experts in these cases.]

It must be conceded that the language used by the learned judge in the summing-up might well convey to the jury that he was giving them an assurance that the usual consequences would not follow a verdict of guilty of murder.

The LORD CHIEF JUSTICE (*a*): This appellant, Edward Lloyd, was convicted at the Durham Assizes of the murder of one Matthew Walls Straughan. The appellant was sentenced to death, and now appeals against conviction.

The evidence shows quite clearly that the defence, and the only defence, raised at the trial was that the appellant was insane, and it is with reference to that defence that he now appeals, and all his grounds of appeal are concerned with that. There is no doubt, and it is not disputed, that the appellant did shoot Straughan, who was a police officer. It is not disputed that he had made certain preparation which at least enabled him to commit that act, and that he uttered certain threats, but the evidence was strong to show that the appellant was, within the meaning of the law relating to insanity and crime, insane at the time of the committing of the act. The appellant's wife and two witnesses, who, however, were not doctors, were called on behalf of the defence, and the evidence so given makes it clear that before the war the appellant, who is now only thirty-one years of age, was always what is described as "a very decent sort of chap," and did not show any sign of queerness. He was in the army from November, 1914, to April, 1917, and was in receipt of a pension for shell-shock. The extracts from the medical reports from the year 1914 right up to October, 1926, were produced and read, and those records make it plain that in 1916 the appellant was removed from duty in the field, that is to say, in France, suffering from exposure, exhaustion and shock, and there follow very grave reports on his mental condition. For example, to take one of

(*a*) Transcript *verbatim* supplied by the courtesy of the Director of Public Prosecutions.

the more recent reports, on 11th September, 1925, a medical board found this:—"Complains of feeling weak. Inability to do any work. Loses control of himself and falls down once every two months or three months. Loses consciousness. Last attack—fell in street and did not know anything about it till he woke up in the infirmary . . . Symptoms and physical signs." Then he is described as "Mentally dull and undeveloped. Emotional and lachrymose . . . his mentality is childish; he has no initiative, lacks concentration, untrustworthy, and could not be depended upon for anything. All the symptoms mentioned in his last board have become intensified to a marked degree. He is now unsocial and generally tremulous, unstable and emotional. His mentality is childish; he is irresponsible and incapable of sustained effort mentally. There has been gross deterioration. It is appreciated that he is not a high-grade mental type."

The report of the Medical Superintendent at Harrowby, where he had been re-admitted on 14th May, 1926, was as follows in July, 1926:—"Congenital mental defective but capable of fending for himself. Discharge would mean infirmary. To be retained in hospital as A case."

It is not necessary to refer to other passages, but evidence was given that after the war the appellant had married and had four children. His wife said he had always been a good husband, sober and temperate, but owing to ill-health he could do only a little work. She described how two years ago he was taken to hospital; she went to see him and he did not recognise her, and last Christmas she said that he attacked her without any reason at all with a rolling-pin. Her father, an old-aged pensioner, had lived with the appellant and his wife for some years, and he said that the appellant was sometimes very queer; he used to catch hold of the father's throat, and when he was told what he had done he used to cry. In fact the father-in-law left the house nine days before the committing of the act, the subject of this enquiry, as he said that he was frightened to stop. The evidence further was that sometimes the appellant used to smash up the house and be very violent, and it would take six or seven men to prevent him from injuring himself and others. Another witness named Robson, who lived next door, said that the appellant used sometimes to turn his father-in-law and his wife out of the house although he was very fond of her, and in his mad fits used to become very violent

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and did not appear to remember what he had done. Robson saw the appellant immediately after he had fired the second shot in this case, and he said that the appellant's eyes were half out of his head. Mrs. Elliott said the general opinion was that the appellant was not right in his head. She saw his face just after the shooting, and she said that she was so afraid that she ran away, his eyes seemed to be standing out of his head. The appellant's wife said that when he came into the house immediately after the shooting his eyes were starting out of his head and there was froth on his mouth. There was another witness named John Troop who lived in that neighbourhood, and had been at school with the appellant. He had known the prisoner, he said, since he was at school, and he was at school with him. He was the witness who used the words, "A good, decent sort of chap." He said that after he came out of the army there was "a big change," a complete change. "At different times he used to lose his head, and used to smash the house up and had to be pacified down. It used to take bigger men than me to keep him quiet—six or seven." The witness went on to explain that it was not the result of drink. He said, "I thought he was a teetotaler. At times, when we got him quietened down a bit, he used to cry, and he would then lie in bed for a day or two and we could not make head or tail of him." He said he sometimes had to go to assist in calming him down.

Now in those circumstances, although undoubtedly there was evidence the other way, it is clear, and it is not denied by the prosecution, that there was substantial material upon which the jury might have found a special verdict, that is to say, that the appellant, although he committed the act, was insane at the time so as not to be responsible. Counsel has stated on behalf of the prosecution that in this case there was undoubtedly material upon which the jury would have been justified in arriving at that verdict. They did not, in fact, arrive at that verdict; on the contrary, they arrived at a verdict of wilful murder but with a strong recommendation to mercy, and that phrase in the circumstances is significant. Unfortunately the learned judge, for reasons which it is not difficult to imagine, and perceiving, no doubt, the sympathy which was naturally excited by the case, employed a rather unusual reference to the possibility and the possible and probable consequences of a recommendation to mercy. He said in the clearest terms that he

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was going to tell the jury the two possible verdicts, and thereupon he added: "One is a verdict of guilty of murder. Although I am not at all fond of inviting juries to accompany verdicts with recommendations to mercy, yet I think it would be quite right in this case. You probably know you have the power to accompany a verdict of guilty, if you think it necessary to find one, with a recommendation to mercy. I will tell you one thing further; that is, that if you do so, it falls to my lot to say whether or not I agree with your verdict, and if there is a recommendation, whether I agree with your verdict. I need not indicate further what is done, but the Crown has to be advised, and the Crown is advised by proper authorities, who ultimately decide whether sentence of death is to be carried out, and these authorities consult the presiding judge. I tell you further that, although it is not for you or me to dictate what should or could be done, it is fair to say that such recommendations, so supported, are not lightly, if ever, disregarded. That is one verdict you can find, a verdict of guilty accompanied by a recommendation, if you think fit." Then having briefly examined the evidence, the learned judge concluded with these words: "I should advise you to retire, because you are not going to try the next case Those are the two possible verdicts, guilty with a recommendation to mercy, or guilty but insane." Having been so directed the jury, after an absence of nineteen minutes, returned into Court saying that they found the prisoner guilty, but with a strong recommendation to mercy, whereupon the learned judge added: "I shall support that recommendation."

Now with regard to that passage, it is enough to say that in our opinion it is a little unusual and a little unfortunate. It is not denied that the effect of those words upon the mind of the jury may have been to lead the jury to think that it would be better for the prisoner if they found a verdict of wilful murder, especially as it was not probable in the circumstances that the verdict of murder would be followed by the normal consequences, and it is difficult to resist the view that if it had not been for these unusual words relating to a recommendation to mercy and what might follow such a recommendation, the jury here might well have found the verdict which is briefly, though inaccurately, described as "Guilty but insane."

That, however, is not enough for this Court. It is not enough that we should be of the opinion that in the absence of this

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irregularity the jury might, or even would, have returned the special verdict under the statute. When we are asked to substitute that verdict there is a positive duty imposed upon us, the duty, namely, of being ourselves satisfied. The words of the section in the Court of Criminal Appeal Act are these, in s. 5, sub-s. (4): "If on any appeal it appears to the Court of Criminal Appeal that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the court may quash the sentence passed at the trial and order the appellant to be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883, in the same manner as if a special verdict had been found by the jury under that Act."

In this case not only are we of opinion that but for the passage already referred to the jury might have, and probably would have, returned the special verdict under that statute, but we are ourselves satisfied upon the evidence that although the appellant was guilty of the act charged against him he was insane at the time the act was done, and accordingly the order of the Court is that the sentence passed at the trial be quashed, and that the appellant be kept in custody as a criminal lunatic under the Trial of Lunatics Act, 1883.

This appeal therefore is allowed, and that order for detention is made.

Special verdict substituted and sentence varied accordingly.

T. R. F. B.

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If a witness is proved to have made a statement, though unsworn, in distinct conflict with his evidence on oath, the proper direction to the jury is that his testimony is negligible and that their verdict should be found on the rest of the evidence.

Appeal against conviction on certificate.

Appellant was convicted of incest at the Hampshire Assizes, on November 16th, 1927, and was sentenced by Shearman J. to eighteen months' imprisonment.

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C. Bray for appellant, who was not present. Appellant was charged with incest with his daughter. When she came to give evidence she denied that her father had acted improperly towards her on any occasion. The learned judge allowed her to be treated as a hostile witness, and a previous statement that she had made to the effect that appellant had had connection with her was put in. The judge gave a certificate for appeal, in which he stated: "When the witness [the daughter] was called and denied that the accused had had intercourse with her, I allowed her, upon proof that she had signed a statement saying that the accused had had intercourse with her, to be treated as hostile. I then allowed the gist of this signed statement to be read to the jury, at the same time informing them that it was not evidence against the prisoner, but only evidence to show that her sworn evidence to the contrary was not conclusive, and telling the jury that they must be satisfied by the evidence other than hers that the accused was guilty." The previous statement should not have been put to the witness in this case in the way it was—*i.e.*, read out to the jury—because that procedure is permissible only when the witness has denied having made a statement inconsistent with his sworn evidence. Further, it was not proper that, because in the previous statement there was said to be matter of contradiction on some relevant point, permission should have been given to put to the witness a number of irrelevant details, simply because they happened to be in the statement she had previously made. [He referred to the Criminal Procedure Act, 1865, 28 & 29 Vict. c. 18, ss. 3, 4, 5 and 6.] Apart from the daughter's evidence, there was no sufficient evidence on which the jury could convict, the medical evidence being equally consistent with guilt or innocence. Moreover, there was a suggestion in the summing-up that the jury might, if they chose, accept the unsworn statement of the daughter as evidence.

G. D. Roberts for the Crown was not called upon.

The LORD CHIEF JUSTICE (*a*): This appellant, Leonard Harris, was convicted at Winchester Assizes of incest. He was sentenced

(*a*) This judgment is a transcript of the shorthand report supplied by the courtesy of the Director of Public Prosecutions.

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to eighteen months' imprisonment, and now, upon a certificate granted by the learned judge of the court of trial, appeals against his conviction. The allegation of the prosecution was that the appellant had committed incest with his daughter, Olive Isabel, on the 15th and also on the 16th October. It is not necessary at this moment to enter into the unpleasant facts of the case. The appeal has turned upon the question whether there was irregularity in dealing with the girl, Olive Isabel, who was undoubtedly called by the prosecution for the purpose of supporting the case that the acts complained of had indeed been committed. She had in fact, on an earlier day, made a statement to the police. That statement, which was signed by her undoubtedly, if true, incriminated the appellant. Being called to give evidence at Assizes, she denied that any such act as that which was alleged had been committed. Thereupon the learned counsel for the prosecution put to her the allegation that she had previously made the contrary statement, in other words, that she had previously said that her father, the appellant, had committed these acts, and the learned counsel for the prosecution was allowed to cross-examine the witness in view of her contradiction of herself, and in view of the fact that being called for the prosecution she had now made herself an adverse witness, and to put to her piecemeal, passage by passage, what was contained in the statement previously made by her to the police. She admitted that the assertion contained in that statement had indeed been made by her, but she denied that those assertions were true.

In the argument for the appellant one cannot help observing that there is a certain confusion of two quite different things. The attention of the Court was directed to s. 4 of Mr. Denman's Act, which is dealing with those cases where it is right to give affirmative evidence of previous statements made by a witness. S. 4 of that statute provides that "If a witness, upon cross examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it. . . ." But that is a provision with reference to a state of affairs that did not exist here. There was no question here of giving proof that the former statement was made. It was admitted that the former statement was made. The real grievance

of this appellant, if he has a real grievance, is that the daughter, having exhibited herself as a hostile witness, was permitted to be cross-examined with reference to the assertions which she admitted she had previously made. That is quite a separate and distinct matter, and the confusion of the one and of the other is rendered possible by the ambiguous use of the phrase "putting in." In this case there was no question of putting in the previous statement of the witness in the true sense of putting in. The use which was made of that previous statement was that the witness was cross-examined upon it passage by passage. It did not need Mr. Denman's Act to render that process possible. It is well established in the familiar words which are to be found, for example, in Archbold, that "The character of a witness for habitual veracity is an essential ingredient in his credibility; for a man who is capable of uttering a deliberate falsehood is in most cases capable of doing so under the solemn sanction of an oath. If, therefore, it appears that he has formerly said or written the contrary of that which he has now sworn (unless the reason of his having done so is satisfactorily accounted for), his evidence should not have much weight with a jury, and if he has formerly sworn the contrary, the fact (although no objection to his competency: *Teal*, 11 East, 309: 1809), is almost conclusive against his credibility"; in other words, it was permissible to cross-examine this girl upon the assertions she had previously made, not for the purpose of substituting those unsworn assertions for her sworn testimony, but for the purpose of showing that her sworn testimony, in the light of those unsworn assertions, could not be regarded as being of importance. It is upon that matter that confusion has sometimes arisen. It has undoubtedly sometimes been thought that where a witness is cross-examined upon a previous unsworn statement and admits the fact that the statement was made, but says that the statement was untrue, that unsworn statement may sometimes be treated as if it could be accepted by the jury in preference to the sworn statement in the witness box, and in like manner sometimes where the witness has denied having made the previous statement, and evidence has thereupon been given that the previous statement was made, there has been, at least, a suggestion that the jury, if they chose, might accept the previous in preference to the sworn statement. That, of course, is all wrong, as has been pointed

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out on various occasions by this Court, and not least in the case of *A. White*, 17 Cr. App. R. 59, 60: 1922: c. q. No such question as that arises here, because when the learned judge came to sum up he was exceedingly careful to say that the effect of this collision between the sworn testimony of the girl, on the one hand, and her unsworn assertions, on the other hand, was to make her a witness who should be neglected. He says, for example: "It is like a case arising out of a collision between two motor cars in which a witness comes and swears that one of the cars was going at forty miles an hour on the wrong side of the road, and then he is asked, 'Did you sign that statement, and did you give it to the other side? the statement saying the car was only going ten miles an hour and on the right side of the road.' In such a case as that the jury would very rightly pay no attention to his evidence one way or other, and that is just what you may do in this case, the girl's evidence may be neglected," and in that state of the matter the learned judge addressed his mind and directed the mind of the jury to the question whether, the evidence of the girl herself being cancelled out, there was other and sufficient evidence upon which the appellant might be convicted. And he said: "On the evidence of the two children, and on the third one, this girl, it is proved that this girl spent the two nights there," that is to say, in her father's bed. "Then there is the doctor's evidence that somebody or something had been tampering with her within two days. Does that satisfy you that this man was guilty or not guilty of having sexual intercourse with this girl?" in other words, the matter is put clearly to the jury upon the footing that in the events which had happened the sworn testimony of the girl herself is to be obliterated, and that the case for the prosecution is to rest upon the testimony of witnesses other than that of the girl herself. Attention has been directed to one or two phrases in which it seems to be suggested that these former assertions, having been admitted to be made, were in themselves a kind of evidence supporting the case for the prosecution. If any such direction as that had been given it would, of course, have been wrong, but when one looks at the phrases referred to, and all of them, and the summing-up as a whole, it is apparent that the learned judge directed the jury in the proper way, namely, that the effect of the previous statement, taken together with the sworn statement, was to render the girl a negligible witness, and that

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the jury must consider whether the case was otherwise and by others made out. In those circumstances it appears to us that here was no misdirection and, on the contrary, the jury being rightly directed, convicted the appellant upon evidence which justified them in so doing. The appeal, therefore, is dismissed. A certificate having been granted the sentence will run not from this day, but from the day upon which it was passed.

Appeal dismissed.

T. R. F. B.

Solicitor for Appellant—*L. G. Groves,* Southsea.

FRANCIS HERBERT CLARKE AND GEORGE MICHAEL UNDERWOOD.

Severity of sentence.

Appeals against sentence by leave of the Court.

Appellants pleaded guilty to larceny at Essex Assizes, on October 28th, 1927, and were each sentenced by Rowlatt J. to twelve months' imprisonment with hard labour.

E. H. Tindal Atkinson for the appellants (under s. 10 of the Criminal Appeal Act, 1907), who were present. It does not appear to be necessary to add anything to the written report on the antecedents of these appellants, which is already before the Court.

E. A. Hawke for the Crown was not called upon.

AVORY J.: Both these appellants are quite young, and both had joined the army a short time before the commission of the offence for which they were sentenced, namely, larceny of a motor car. They were not represented at the trial, and it is just possible that, if they had been represented by counsel, the question might have been raised whether the felonious intent of per-

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manently depriving the owner of his property in the car could be established. It must, however, be assumed that the accused knew to what they were pleading guilty. The judge at the trial does not appear to have had before him a complete report on their previous records. This Court has had the advantage of a full report, which states that up to the time of joining the army they were both industrious and well-behaved lads. In the circumstances this Court has come to the conclusion that these sentences should be revised, and that each of the appellants should be placed under his own recognisances to come up for judgment if called upon at any time within two years. In the meantime they must undertake to return at once to their respective homes, and there report themselves to the respective probation officers, and be under their supervision. Upon entering into these recognisances they may be released.

Sentence reduced.

T. R. F. B.

FRANK VILLARS.

The Court is bound to inform an undefended prisoner of his right to give evidence on oath, before verdict found.

Appeal against conviction by leave of the Court.

Appellant was convicted of attempted burglary at Chester City Sessions, on October 21st, 1927, and was sentenced by the Deputy-Recorder to nine months' imprisonment with hard labour.

Bertram Long for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The conduct of the trial was extremely irregular. The accused was not represented by counsel, and at the close of the case for the prosecution the Deputy-Recorder at once commenced his summing-up, without affording the accused the opportunity of giving evidence or calling witnesses. The jury retired and returned a verdict of guilty. The Deputy-Recorder then recollected that he should have allowed the accused an opportunity of giving evidence, and invited him to do so, which he then did. The Deputy-Recorder then summed-up again, but the summing-up was entirely inadequate.

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[He was stopped by the Court.]

A. S. Davies for the Crown. No substantial miscarriage of justice occurred in this case. There was some evidence that the accused knew of his right to give evidence. It was held in *W. Yeldham* and *E. Yeldham*, 17 Cr. App. R. 18: 1922, that an omission on the part of the presiding judge to inform an undefended prisoner of his right to give evidence is not necessarily a ground for quashing a conviction, and reference there is made to a similar decision in *J. Saunders*, 68 L. J. Q. B. 296; 63 J. P. 24: 1899; C. C. R.: c. q.

[The LORD CHIEF JUSTICE: If the facts in *Yeldham* be regarded, is not that case, so far from being similar to this case, its exact opposite?

AVORY J.: *T. Graham*, 17 Cr. App. R. 40: 1922: c. q., is a close parallel to this case.]

BRANSON J. (*a*): This appellant was convicted at the Chester City Assizes, before the Deputy-Recorder, of attempted burglary, and sentenced to nine months' hard labour. He appeals against his conviction. The substantial ground of his appeal is that the Deputy-Recorder forgot to tell him that he could give evidence if he wished, but immediately the evidence for the prosecution was finished, proceeded to sum up the case to the jury, and let them go and consider their verdict without informing the appellant of his right to give evidence or to make a statement if he wished. Upon the return of the jury they found a verdict of guilty. It then occurred to the Deputy-Recorder that he had made the omission mentioned, and he proceeded to attempt to repair it by telling the jury that he had made this mistake, and then inviting the appellant to go into the box and to give evidence if he desired. The appellant said that he had desired to give evidence, and after some hesitation he went into the witness box and gave evidence. The jury then retired afresh, and came back again with a verdict of guilty. In those circumstances it is contended on behalf of the appellant that there was an irregularity

(*a*) This judgment is a transcript of a shorthand report supplied by the courtesy of the Director of Public Prosecutions.

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in the trial which makes it impossible for this Court to allow the conviction to stand. Two cases have been cited to us, one, the case of *William Yeldham and Elsie Florence Yeldham,* which is reported in Volume 17, Criminal Appeal Reports, at page 18, and the other, the case of *Thomas Graham,* reported in the same volume at page 40. It is said on behalf of the Crown in this case that this Court decided in the case of *Yeldham* that omission on the part of the presiding judge to allow the prisoner his opportunity to give evidence or to make a statement is not a ground for quashing the conviction. It is argued that the case of *Yeldham* is an authority for that proposition, but one has only to examine the facts of that case to see that that is not the case. In that case two persons were charged together with murder. At one part of the trial they were both represented by the same counsel. While they were so represented, counsel stated that he proposed to call the man only, and not to call the woman. At a subsequent stage of the case it appeared impossible for the same counsel to defend both, and he continued to defend the man, and the woman from thence on was undefended by counsel, but the whole of the evidence which she could have given was contained in a long statement that she had given to the police, and that statement had been read. Taking all those facts together, taking the fact also that the husband had gone into the witness box in her presence and given his evidence, and taking also the fact that even when she appealed she did not indicate that she desired to give any evidence either at the trial or, if she was allowed to do it, in this Court, the Court came to the conclusion that, having regard to the nature of the evidence against her, the fact that she had not been specially invited to go into the witness box to give evidence or to make a statement from the dock, was not sufficient ground for quashing the conviction.

In the other case, in the case of *Graham,* which is much more like the present case, the case of *Yeldham* was quoted, and my Lord, who was presiding at the hearing of the appeal of *Thomas Graham,* pointed out that there were special circumstances in the case of *Yeldham,* and the Court proceeded to quash the conviction of *Graham* upon the ground that he had not been informed of his right to give evidence or to make a statement if he wished. Now it is said that in the present case the Court ought to act in the same manner as they acted in *Yeldham's* case, but in our

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view that case is very different from this. The evidence against the prisoner in this case, so far from being overwhelming, was such that he had a real defence which the jury should have considered. Whether the defence was in fact true or not is not material for us to consider. The whole evidence against him was a half-hearted identification of him by the woman whose house he was alleged to have attempted to enter, and a comparison of a plaster cast of a heel-mark of a boot with one of the boots that he was wearing. There was evidence that at the same time, shortly after the house had been attempted to be entered, appellant was walking along a road some distance from the house, and that fact was relied upon as helping to couple him with the attempted burglary at this house; but there was also evidence that another man was about at the same time and about the same road in which the prisoner was seen. Those were facts which the jury should have had a proper opportunity of considering after having heard what the appellant had to say and wished to say, and before they retired to consider their verdict. The result is that in our opinion this conviction cannot stand, the appeal must be allowed, and the conviction quashed.

Conviction quashed.

T. R. F. B.

WILLIAM GEORGE WEALE.

On the trial of an allegation of being a habitual criminal the direction to the jury must include a statement of the statutory requirements essential to establish it, and deal with any evidence of honest work done by accused out of prison.

Appeal against sentence and application for leave to appeal against conviction.

Appellant was convicted of burglary and larceny at the Merthyr Tydvil Borough Quarter Sessions, on November 2nd, 1927, and was also found to be a habitual criminal. He was sentenced by the Recorder to three years' penal servitude and five years' preventive detention.

Appellant, who was present, read a statement to the Court.

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T. W. Langman for the Crown. The summing-up was extremely short, but was not inaccurate in any essential matter. There was a statement in it that the appellant had been associating with thieves since his release from prison, and that doubtless referred to the fact that one of the offences was committed in conjunction with a man who had been convicted of theft before. The period during which the appellant had done work was so short that the Recorder may well have considered that it would be fairer to the appellant not to refer to it at all.

AVORY J.: There is no ground for interfering with the conviction of the appellant for burglary and larceny. He was, however, also charged with being a habitual criminal. Evidence was given of a very long list of convictions beginning in 1902. His last conviction was on November 23rd, 1926, when he was sentenced to six months' hard labour for larceny. He was released from serving that sentence in April, 1927, and the earlier of these offences was committed on July 8th. The appellant was represented by counsel at the trial, but the Recorder in his summing-up appears to have treated the question whether the accused was a habitual criminal in a somewhat casual manner. He did not even tell the jury what were the essentials provided by statute before the appellant could be found to be a habitual criminal. He merely stated that there was a terrible list of previous convictions; that the appellant came out of prison only last April; and that he had been associating with thieves since he came out, and was much addicted to drink. There was, in fact, no evidence that the appellant had been associating with thieves, except that at the time of the burglary he was in the company of a thief, who was sentenced at the same time as the appellant. The expression "associating with thieves" would not ordinarily be understood to mean that the appellant was on one occasion seen in the company of a man who had been previously convicted of theft. There was not a word said to the jury in regard to the alternative open to them, namely, that of finding the appellant not to be a habitual criminal, if they were satisfied he had made a genuine endeavour to do work and lead an honest life. There was no reference to the fact that he had done honest work, even if only for a few days.

On the whole, the Court has come to the conclusion that the

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summing-up was unsatisfactory in that it did not put before the jury the alternative of finding the appellant not to be a habitual criminal, and that the conviction as a habitual criminal must be quashed; but in view of the previous record of the appellant, and the fact that he was convicted of burglary committed in conjunction with another convicted thief, we think that the sentence for the substantive offences must be increased to one of five years' penal servitude.

Conviction as habitual criminal quashed.

Primary sentence increased.

T. R. F. B.

WALTER BEARD.

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Application for leave to appeal against conviction as a habitual criminal, although no sentence was passed thereon.

Applicant was convicted of housebreaking and of being a habitual criminal, at the Central Criminal Court, on November 10th, 1927, and was sentenced by the Recorder to three years' penal servitude, but not to preventive detention.

He applied for leave to appeal against the latter conviction and against sentence on the former.

Venetia Stevenson for the applicant, who was not present.

Application dismissed.

Solicitor for Applicant—*D. H. Williams.*

H. J.

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GEORGE ASCOLI.

For the purposes of sentence recourse should only be had to the Penal Servitude Act, 1926, where the maximum term under the ordinary law is inadequate.

Severity of sentence.

Application for leave to appeal against conviction and sentence.

Applicant was convicted at the Central Criminal Court, on November 10th, 1927, of obtaining credit by fraud other than false pretence, and was sentenced by the Recorder to three years' penal servitude.

P. Vos for the applicant, who was present. The charge is under s. 13 of the Debtors Act, 1869. The question for the jury was—when the defendant ordered the goods, had he or had he not the intention to pay for those goods? The learned judge in the Court below wrongly directed the jury as though he was dealing with a charge of obtaining goods by false pretences. I refer particularly to the passage in the learned judge's summing-up in which he deals with the evidence given by a witness for the prosecution, one Stanley Roberts. Stanley Roberts gave evidence to the effect that the prisoner had ceased to have anything to do with the business carried on at 23, George Street, after March, 1926, and other evidence was called to show that subsequent to March, 1926, the prisoner had ordered goods as the proprietor of the George Street business. The learned judge deals with this evidence as follows:—"That is where the fraudulent holding out comes in. You know what I mean by holding out, holding out that you are not what you seem to be, and getting credit." There was no indictment before the jury for obtaining credit by false pretences, and the learned judge was wrong in putting before the jury evidence of a fraudulent holding out.

There is now before the Court a statement by the witness Roberts to the effect that he was mistaken in his statement in the Court below that the prisoner ceased to have anything to do with the business after March, 1926. He now says that the correct date was August, 1926, and there is now before the Court an affidavit sworn by Roberts to that effect. The fraudulent holding out which was suggested by Roberts' evidence undoubtedly had

a considerable effect on the mind of the judge and upon the jury. Apart from its being based upon a mistake of fact given in evidence, it was wholly irrelevant to the charge with which the judge and jury had to deal.

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The prisoner was found guilty on six counts, and the learned judge, applying the provisions of the Penal Servitude Act of 1926 (16 & 17 Geo. 5, c. 58), sentenced him to three years' penal servitude. The offences were not of such a character as would justify the learned judge in applying the provisions of that Act, which was meant for crimes of a particularly obnoxious character, such as offences against the person.

The application against sentence (only) was allowed.

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G. D. Roberts, for the Crown, explained that penal servitude had been inflicted in this case because the offences were part of a long series; the indictment involved sums amounting to £250, and credit to between £900 and £1,000 in all; and there were three previous convictions for fraud and one for receiving with guilty knowledge. However, he was not instructed to press the sentence.

Vos was not called upon.

The LORD CHIEF JUSTICE: Appellant is thirty-three years of age, and is described as a tailor. He was found guilty upon six counts of an indictment under the Debtors Act, 1869, alleging fraud other than false pretences, and was sentenced under the Penal Servitude Act, 1926, of which s. 1 (1) is:

"Where a person is convicted on indictment of two or more offences to which this Act applies, in respect of which he is liable to be sentenced to terms of imprisonment amounting in the aggregate to a period of not less than three years, the Court may, instead of sentencing him to imprisonment, sentence him to penal servitude for any term not exceeding the aggregate period for which he might have been sentenced to imprisonment, so, however, that no sentence of penal servitude imposed under this section shall be for a term exceeding seven years."

Now undoubtedly appellant was liable in respect of each count to twelve months' imprisonment, and the learned Recorder applied

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the Penal Servitude Act to the aggregate terms. But that statute is clearly intended only to apply to cases where the maximum sentence by ordinary law, though sufficient for the particular offence or group of offences, is not sufficient for a considerable group taken together. The question is—is this such a case? Was the maximum sentence by ordinary law, apart from that statute, inadequate? We think not. The ordinary law is adequate, and no recourse to the statute was needed. The sentence is reduced to one of twelve months' imprisonment with hard labour in accordance with the Act of 1869. As leave was only given to appeal against sentence, the conviction will run from yesterday.

Sentence reduced.

H. J.

Solicitor for the Appellant—*Harry Burford Judge.*

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CHARLES KING.

If, owing to the course of the defence, evidence is elicited tending to show that defendant has been previously convicted, a conviction will not necessarily be quashed. Hemingway, 8 *Cr. A. R.* 47, *distinguished.*

Appeal against conviction by leave of the Court.

Appellant was convicted at the County of London Sessions, on November 11th, 1927, of warehouse-breaking, larceny and guilty receiving, and was sentenced by the Deputy-Chairman to twenty-one months' imprisonment with hard labour. Rachael Hatton was jointly charged but was acquitted.

Only one point calls for report.

S. T. T. James for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. At the trial I appeared for both defendants, and at Hatton's request, when she elected to give evidence, I asked her the following questions:—

Assuming you had known, it is only an assumption, that the dress had been sent by the prisoner in the dock, would you have thought you were receiving stolen property?

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Answer: Well I do not think Tall Alf [the appellant] would give me a present, because there was no necessity for it.

[The Deputy-Chairman: What you were asked was: "Supposing it had been Tall Alf who sent it, would you have thought it was stolen?"]

Answer: Well, it is hard to say.

James: I put it to you again: Would you have received it if you had known it was stolen?

Answer: I do not understand that; if it was stolen and I knew it?

At this point I stopped, but the Deputy-Chairman asked Hatton:—

If you had known it came from Tall Alf would you have taken it?

Answer: No, I would have asked where he got it from; as to how he came to have such a dress.

The ground for appeal is that on account of the answer to the question put by the learned Deputy-Chairman the jury were led to believe that appellant was a man of bad character, and they might have been led to believe that he had been previously convicted, as indeed was the fact. See *Hemingway,* 8 Cr. App. R. 47: 1912: c. q.

Byrne for the respondent was not called upon.

The LORD CHIEF JUSTICE (after dealing with the facts of the case): Now, one of the stolen dresses was traced to a woman named Rachel Hatton, and she was indicted at the same time with the appellant, and the charge against her was receiving the property knowing that it had been stolen. The same learned counsel defended both the appellant and her, and her case was that she was a prostitute; that the dress had been handed to her by another girl, to whom a man had given it in order that it might be taken

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to her; and in the result Rachael Hatton was acquitted. The appellant himself gave evidence and set up an *alibi*. He was, he says, at a wedding feast, and some other evidence was adduced to support that statement; but unfortunately Rachel Hatton gave evidence, and her statement was that she had lied to the police about the dress at the beginning. When she was cross-examined whether or not it was the appellant, spoken of as "Tall Alf," who had given the dress to her, she repudiated that suggestion; and then followed a series of questions put by the learned counsel for the defence, reiterated and followed up by the learned Deputy-Chairman, which conceivably, though not necessarily, may have indicated to the jury that this appellant, being the same person as Tall Alf, was a man of doubtful character. I say "not necessarily" because it may be that the questions and answers convey a different impression, namely, that he was a man of means so moderate as that he was not to be expected to give her a dress of that kind. But however that may be, if it is indeed true that these questions and answers thus elicited prejudiced the minds of the jury somewhat against the appellant, one can only say that the conduct of the defence brought that verdict on the appellant himself. It was not anything done by the prosecution, nor was it anything done by the Court. Our attention has been directed to the case of *Hemingway*. There, of course, the jury's attention was directed to the fact that the prisoner had been previously convicted, and, what is more, that was admitted in a case where the evidence for the prosecution was slight. In this case the evidence for the prosecution was strong, and there was evidence to support his conviction without any help, if indeed help was given by these questions and answers, in which the words "Tall Alf" occur.

In these circumstances there is no reason at all for interfering with the conviction, and the appeal is dismissed. Leave having been given to appeal, the time, however, will run from the time of conviction and not from to-day.

Appeal dismissed.

H. J.

The Court also sat on December 21st.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE BRANSON.

DANIEL DRISCOLL, EDWARD ROWLANDS AND JOHN ROWLANDS.

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January.

The Court cannot deal with the insanity of an applicant which supervenes after trial.

Comments on overstatements in counsel's opening speech for the prosecution.

Applications for leave to appeal against conviction and to call further evidence.

Applicants were convicted of murder at Cardiff Assizes on December 2nd, 1927, after a four days' trial before Wright J., and were sentenced to death.

Only two points need be noticed.

Artemus Jones, K.C. (with him *Sir Travers Humphreys* and *Trevor Hunt*) for Driscoll; *Hemmerde, K.C.* (with him *W. M. Davies*) for Edward Rowlands, who were present. *Goodman Roberts* for John Rowlands, who was not present (owing to his mental condition). In answer to the Court *Roberts* said that he had no objection to the case proceeding in his client's absence if the Court thought fit, but he had no official instructions.

[THE LORD CHIEF JUSTICE: As this is a mere application the hearing may proceed.]

Both counsel for the applicants present began their addresses to the Court by protesting strongly against the opening speech of counsel for the Crown at the trial. It only lasted twelve minutes, but counsel informed the jury that the accused were "members of a murderous racing gang entering on a cold-blooded and con-

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certed plan to murder or to maim the deceased, with whom they had a feud, and whom they wanted out of the way"; these words were taken from a local newspaper report.

[*The Earl of Halsbury, K.C.* (with him *Langman*), for the Crown, stated that the note of *Artemus Jones, K.C.*, was mistaken: the report in the "Western Mail" is substantially accurate.]

Hemmerde, K.C., accepted this statement and read from that report.

"They [the four prisoners and the deceased] and others, who would be called, constantly attended race meetings, where they had business. . . . Undoubtedly there was quarrelling going on between the accused and the murdered man. He [Ld. H.] submitted that there was a cold-blooded and concerted plan. . . . He would submit that they were out as a gang to murder a man whom they wanted out of the way, or at least to maim him."

It could be distinctly proved by the police evidence—to call which leave was asked—that Driscoll was not a member of a racing gang, and that he was not an associate of the other prisoners, and had not previously known the deceased; and that so far from being at feud with the deceased, they were all quite friendly together. Moreover, it was proved that on the day of the death Driscoll had not been at Monmouth races, though counsel had opened the contrary. Yet there was not a word of warning in the summing-up against allowing such statements to influence the mind of the jury. Though notice of additional evidence had been given to the defence, there was not a word on these points.

The Earl of Halsbury, K.C.: I had statements from two witnesses which amply justified my opening, but in their evidence they did not bear out their statements. The one point I was unable to prove was that there had been a previous quarrel with the deceased.

The Court declined to hear the evidence tendered.

The LORD CHIEF JUSTICE (after dealing with the facts) said: It is, however, to be regretted that counsel's opening speech did

overstate the case for the prosecution in certain respects—counsel, no doubt, being misled by some materials in his instructions. But it is idle to suggest that after a four days' trial the expressions complained of could have dominated the opinion of the jury. With regard to the absent applicant, this Court is concerned with his mental condition only at the time of the act charged.

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Applications dismissed.

H. J.

Solicitors for Driscoll—*A. Frank Hill & Co.*, Cardiff.

Solicitor for Edward and John Rowlands—*H. M. Lloyd*, Cardiff.

ALBERT MICHAEL McDONNELL.

13 *January.*

A simultaneous trial of two indictments is a nullity.

Appeal against conviction.

C. Doughty for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present, stated the facts which appear sufficiently from the judgment.

L. Fletcher for the Crown.

The LORD CHIEF JUSTICE, in giving judgment, said that the appellant had been convicted on December 3rd, 1927, at the Maidstone Borough Sessions, of stealing a bicycle at Folkestone, and sentenced by the Recorder to three months' imprisonment.

There were no merits at all on the facts, but it happened that when the appellant was arrested there was a parcel of clothing found near the bicycle, and a charge of stealing the parcel of clothing was made the subject of another indictment. There were thus two indictments, one for stealing the bicycle, and one for stealing the clothes. No one appears to have been aware of the

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existence of separate indictments, and the case proceeded as if there had been two counts in one indictment.

The jury found the appellant guilty of stealing the bicycle, but not guilty of stealing the clothing.

It was impossible to resist the conclusion that the whole trial was a mere nullity. The case was covered by *W. Crane*, 90 L. J. K. B. 1160; 125 L. T. 642; 85 J. P. 245; 65 S. J. 642; 37 T. L. R. 788; 2 App. Cas. 299; 15 Cr. App. R. 183: 1921. In this case, however, the Court has decided that there should be no *venire de novo*, but will quash the conviction. The appellant had been detained for six weeks instead of the nine or ten he would have had to serve.

Conviction quashed.

G. P. G.

RONALD PAUL LANCASTER ROSE.

Severity of sentence.

On an indictment for manslaughter by driving a motor-car, speed alone is not necessarily evidence of criminal negligence.

This was an application for leave to appeal against a sentence of six months' imprisonment in the second division for manslaughter, imposed by Talbot J. at the Central Criminal Court on the 13th December, 1927.

Sir H. Curtis Bennett, K.C. (with him *Sir Travers Humphreys*) for the appellant, who was present on bail. The appellant was an undergraduate of Magdalene College, Cambridge, and only twenty years of age. On the day in question he went in his car to Eton to play football, and took his tutor with him. On the return journey he dined at St. Albans, and then set out with two other undergraduates to return to Cambridge. He admitted that near Baldock he was travelling at the rate of forty miles an hour, when a cyclist named Izzard came out of a side road. Appellant applied his brakes, but the car skidded and hit the cyclist and killed him.

The whole trial had turned on a question of speed. Appellant

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and his witnesses said that it was forty miles an hour, the prosecution said that it was fifty. Driving too fast was the only negligence that was alleged against appellant, but it could not be too strongly insisted upon that the cyclist must have known that the car was approaching, as the car's headlights threw a beam 600 feet ahead.

Nineteen out of twenty juries would probably have acquitted. Manslaughter is a crime which varies from a very serious crime, calling for a long sentence of penal servitude, and something far less serious. This is an example of the least serious form of manslaughter.

Appellant had already suffered one terrible punishment. By his conviction he had had to abandon his whole career. It was no longer possible for him to obtain a commission in the Brigade of Guards. He had also actually served ten days in prison before being released on bail.

Frederick Levy for the respondents, the Herts Police.

AVORY J.: This was a case of manslaughter by killing an unfortunate young man through the criminally reckless driving of a motor car near Baldock on the night of October 29th, 1927.

The Court has given this case anxious consideration—on the one hand there have been too many cases of reckless driving resulting in manslaughter lately—on the other hand, no offence varies so much in gravity as manslaughter. One must look at the circumstances in each particular case and see whether it is an offence which calls for severe or mitigated punishment.

In this case there was an admission by the appellant that he was driving at the rate of forty miles per hour—but the learned judge at the trial said that, having regard to the nature of the road, that speed was not in itself evidence of criminal recklessness. The learned judge also pointed out to the jury that the cyclist must have been aware that the motor car was approaching, and said that in his view the cyclist was guilty of contributory negligence.

In these circumstances, bearing in mind the tutor's evidence of the careful way in which the car had been driven to Eton that very morning, and also bearing in mind that the appellant had suffered imprisonment for ten days before being admitted

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to bail, and had also lost his chance of a commission in any regiment of the Brigade of Guards, the Court had decided to substitute for the sentence of six months' imprisonment in the second division a more lenient sentence. The appellant will be bound over in his own recognisances in the sum of £50 for two years, on the condition that he shall not drive any motor vehicle for that period.

Sentence reduced and varied.

G. P. G.

Solicitors for Appellant—*W. C. Croker*, for *S. J. and S. T. Miller*, Cambridge.

Solicitors for Respondents—*Passingham and Hill*, Hitchin.

ARTHUR WORSLEY DAVIS.

Severity of sentence for bigamy.

This was an appeal against a sentence of eighteen months' imprisonment with hard labour for bigamy, imposed by Horridge J. at Maidstone Assizes on the 24th November, 1927.

L. S. Fletcher for the appellant, who was present, urged the Court to mitigate this sentence on the grounds that in this case the facts did not disclose any grave deception or fraud upon anyone, and that the character of the appellant was such that a lighter sentence should have been imposed.

The Crown was not represented.

The LORD CHIEF JUSTICE: The appellant has pleaded guilty to a charge of bigamy. The facts were that he had married his wife on the 9th September, 1908. They had separated in March, 1911, while they were living at Ramsgate. Mrs. Davis continued to live at Ramsgate with her sister until June, 1923. Meantime the appellant had made the acquaintance of a widow. He has

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now known her for eight or nine years, and for seven or eight years she has known that the appellant was a married man but separated from his wife.

Two years ago the appellant and the widow made enquiries of the Registrar at Wandsworth with reference to a possible marriage. The appellant then stated that he had not seen his wife for over seven years, and said, "I do not want to commit bigamy." The Registrar appears to have replied, "There is no question of that." Accordingly, on the 20th November, 1926, the appellant and the widow went through a form of marriage.

The appellant further does not seem to be of quite normal intellect. He is known as "Crazy Davis."

The conclusion that the Court has come to is that this is a case of *bonâ fide* mistake, and that there was no intention to deceive or defraud the woman.

In the opinion of the Court the appropriate sentence is one of imprisonment for seven weeks and one day, the sentence to run from the date of the trial. The effect is that the appellant is discharged.

Sentence reduced.

G. P. G.

Solicitors for the Appellant—*Robinson and Allfree,* Ramsgate.

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30 *January.*

FREDERICK WARD.

When the charge is larceny by a bailee, and the defence is that there was a sale on credit, the direction to the jury must carefully distinguish between civil and criminal liability.

Appeal against conviction.

Appellant was convicted of larceny, on January 3rd, 1928, at the East Kent Sessions, and was sentenced by the Deputy-Chairman to twelve months' imprisonment with hard labour.

G. Thesiger (under s. 10 of the Criminal Appeal Act, 1907) for the appellant, who was not present.

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Arthur Thesiger for the Crown.

The facts sufficiently appear from the judgment, the allusion in which to a passage from Archbold (p. 542, ed. 27) is to the following words: "As a general rule a bailee cannot be convicted of larceny unless the bailment was to redeliver the *very same* chattel or money."

The LORD CHIEF JUSTICE (*a*): This appellant, Frederick Ward, was convicted at the East Kent Sessions on an indictment which charged him with the larceny of a pair of binoculars, contrary to s. 2 of the Larceny Act, 1910. He was sentenced to twelve months' imprisonment with hard labour, and now appeals against his conviction.

The facts were few and simple. In the beginning of August last, Mr. Jennings, in Kendal, advertised in "The Exchange and Mart" a pair of binocular glasses for sale on approval for three guineas. He received a letter of the 10th August from the appellant at Minster in these terms: "Please send glasses as advertised in 'The Bazaar' at 63*s*.; if not suitable, will return." Thereupon Mr. Jennings sent the glasses by post, and afterwards received a letter from the appellant dated the 17th August, which is now before the Court: "Glasses are quite suitable, and will remit during next few days, if this will suit; if not, will return." The appellant wrote on the 1st September saying that he had written several times to ask what was the price of the glasses as he had mislaid the original letter and could not get the back number of the newspaper, and that the glasses were satisfactory, and he would remit as soon as he heard from Jennings. Mr. Jennings stated that he received no such letter. On the 20th September he sent a registered letter asking for the three guineas or the return of the glasses. To that letter he received no answer. He put the matter in the hands of the police. The fact was that on the 20th August, that is to say, three days after the letter of the 17th August, the appellant had sold the glasses to a man for 25*s*. Now, the appellant gave evidence on his own behalf, and said that his view of the transaction

(*a*) This judgment is from a *verbatim* transcript supplied by the courtesy of the Director of Public Prosecutions.

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was that he had bought the glasses, that he would pay for them when he sold them again, and that if he turned them over at a profit he would have sent the money. He said that the date on the receipt was wrong, that he did not sell the glasses on the 20th August, and that the mistake had arisen because of his not thinking at the time. In those circumstances there was a question by no means without interest and difficulty, and it was essential that the jury should be clearly and fully directed upon the law: was this or was it not a sale on terms of credit? Whatever it was at the outset, what did it become after the appellant's letter dated the 17th August was received, in which he said "Will remit during next few days, if this will suit; if not, will return"? It is obvious that in this case the law relating to such a matter, and especially to a transaction where an option to be exercised in the future may be thought to be given to the purchaser, should have been clearly and fully explained.

Now, what happened? We are told that the case for the prosecution was that there was no question of credit, and that the property did not pass to the appellant until the price was paid. And in support of that proposition a particular sentence seems to have been read from a text-book, and a particular meaning put upon it. The case for the defence was, or at any rate in part was, that the property had passed to the appellant, notwithstanding that he had not paid the price; in other words, that he had bought the glasses on credit. The summing-up says: "We all know what buying and selling means; it means an exchange of one commodity for another, and that is a cash exchange. I am not sure that in this particular case he," that is, the appellant, "did not think that he was buying on credit. That is not the point we are dealing with, because this is a criminal and not a civil prosecution." In other words, the direction on the law obliterates the defence, and even so, in stating affirmatively the law as concerns the case put forward by the prosecution, the summing-up says this: "I think we may all agree that the law as indicated by the counsel for the prosecution was correct; that is, the law that in every case, unless the article is returned, the money, that is, the price of it, must be. There is only just this to constitute larceny by a bailee: there must be a taking or conversion which would permanently deprive the owner of his property. That is simply put, and will no doubt remain in your

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minds." Well, it was simply put, and no doubt it remained in their minds, and it entirely omits the word "fraudulently." It may well be that because they had that passage in their minds in one and the same breath the jury found the appellant guilty of the crime, but expressed the opinion that the case should have been settled in the County Court. In other words, they thought that it really was, apart from the difficulties of geography and the well-known difficulties of travelling, a civil case.

The matter is, of course, quite hopeless; the conviction cannot stand: the appeal is allowed, and the conviction is quashed.

Conviction quashed.

H. J.

JOSEPH HILL.

Severity of sentence mitigated in view of several intervals of honest work.

Appeal against sentence.

Appellant was convicted, on December 21st, 1927, at the Bedfordshire Quarter Sessions, of the larceny of a motor-cycle, and was sentenced by the Deputy-Chairman to five years' penal servitude.

Eales for the Crown.

Appellant in person. I did not in fact take the cycle away, but I was found with it. I was looking for work, tramping with my wife and children, and was suddenly tempted. I have often worked hard, but was not able to bring out all the facts in the Court.

Eales. The facts were not all known below.

The Court stated that it was now in possession of certain facts. Appellant had worked well at various times and had had a good discharge from the Army in 1919. Several employers had sent testimonials, and some were willing, if they could, to take him

back despite several previous convictions for stealing cycles. He would have another chance: sentence would be reduced to twenty months' imprisonment with hard labour from the date of conviction.

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JOSEPH HILL.

Hewart L.C.J.
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Branson J.

Sentence reduced.

H. J.

ALEXANDER GEORGE RUDOLF WAYE.

6 *February.*

Severity of sentence mitigated in view of a period of honest endeavour.

Appeal against sentence by leave of the Court.

Appellant pleaded guilty at the Surrey Sessions, on January 3rd, 1928, to garage-breaking on December 15th, 1927, and was sentenced by the Chairman to three years' penal servitude: one Atkinson was bound over on the same charge.

Appellant in person.

C. R. Morden for the Crown stated the facts.

The Court stated that since the hearing enquiries which had been made showed that appellant had made a genuine effort to earn an honest living. The learned Chairman was misled into thinking that appellant was responsible for instigating Atkinson in May last, but as appellant was then in prison this was a mistake. He had had several previous convictions, and was released last August from a term of three years' penal servitude for housebreaking. There was one charge still pending against him. He is thirty-three years old. In view, however, of his conduct since last August the sentence is reduced to eighteen months' imprisonment with hard labour, to run from January 3rd.

Sentence reduced.

H. J.

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6 *February.*

Hewart L.C.J.
Avory J.
Branson J.

WILLIAM THOMAS otherwise TREVOR WILLIAMS.

In a clear case of recidivism penal servitude may be inflicted as a primary sentence to found that of preventive detention.

Appeal against sentence.

Appellant pleaded guilty at the Cardiff City Sessions, on January 7th, 1928, to obtaining food by false pretences, and was found guilty of larceny, and of being a habitual criminal, and was sentenced by the Recorder to three years' penal servitude and five years' preventive detention.

Appellant in person.

A. Hawke for the Crown.

The Lord Chief Justice: This Court has several times laid it down that penal servitude should not be imposed merely to qualify the prisoner for preventive detention.

In itself the term of three years may seem excessive, but appellant has several times been convicted of larceny (mostly of overcoats, as in this case), and he was only released from a term of three years' penal servitude on November 5th last, and the thefts in question were committed on November 10th and December 3rd and 9th respectively. There are thirteen previous convictions, with sentences varying from three weeks' imprisonment to three years' penal servitude (twice).

Appeal dismissed.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE BRANSON.

WILLIAM PARKIN.

1928
10 *February.*

The granting of a certificate of appeal by the judge at the trial considered.

Appeal against conviction on certificate, and application for leave to appeal against sentence.

Appellant was convicted on January 6th, 1928, at the Sheffield City Sessions, of receiving stolen property with guilty knowledge, and was sentenced by the Assistant Recorder to nine months' imprisonment with hard labour.

Brundrit for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present.

Bramley for the Crown.

The Court dismissed the appeal: it appeared that at the close of the case for the prosecution no submission was made that there was no case to go to the jury.

In the course of the judgment the Lord Chief Justice remarked that it was not easy to see why a certificate had been granted on this case. In *Langley, &c.*, 17 Cr. App. R. 200: 1923, this Court said: "In view of" the learned Recorder's "opinion and his ruling that there was evidence of larceny . . . it is a little puzzling to know why the certificate was granted. It is a departure from the ordinary practice, and if continued would result in a great increase of such cases, and considerable expense would be incurred, as in such cases the prosecution must be represented here, which would mean a great waste of public money." However, the sentence may run from the date of conviction.

Appeal dismissed.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SALTER.

1928
20 *February.*

DAVID EVAN MORGAN.

Severity of sentence.

Appeal against sentence.

Appellant pleaded guilty on January 11th, 1928, at the Norfolk (King's Lynn) Sessions, to two indecent assaults upon male persons, and was sentenced by the Chairman to seven years' penal servitude.

Appellant in person.

Roger North for the Crown. Appellant is twenty-two years old.

The Court (which had had a medical report about appellant) thought that in view of his youth and his health, and that it was not suggested that he had attempted to commit a graver crime, the sentence was obviously excessive. He was already serving a term of imprisonment for an offence of dishonesty, and both terms would now be a concurrent sentence of eighteen months' imprisonment with hard labour from January 11th.

Sentence reduced.

H. J.

DICK BEECH, HARRY POLLITT AND THOMAS ROBERT STRUDWICK.

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20 & 24
February.

Hewart L.C.J.
Avory J.
Salter J.

Proof must be strict that a "Court of Justice" in a foreign state is duly constituted such.

Appeals against conviction.

Appellants (who were not in custody) were convicted of libel at the Central Criminal Court, on October 24th, 1927, after an eleven days' trial, and were sentenced by the Recorder to be bound over and to pay, Pollitt one hundred pounds costs, and the other two appellants fifty pounds. The defence was justification.

Pollitt in person.

Serjeant Sullivan, K.C. (with him *Smallwood*) for the other appellants.

R. Oliver, K.C. (with him *Hawke*) for the Crown was not called upon.

The hearing is only reported on one point.

Sullivan. The words indicted stated that the prosecutor, a British subject, had been guilty of misconduct in Russia, and had been condemned by a competent Russian court. I called M. Tchelinoff, a Russian lawyer, who gave evidence of the present Russian judicature, and who proved that certain documents then produced to him were protocols, depositions and decisions properly sealed, and that offences against revenue and minor offences against public order—such as those imputed to the prosecutor—are in Russia excluded from the jurisdiction of the regular courts, and are tried by enquiry conducted by officers of the Customs or of the police in the presence and hearing of the accused, who testifies for himself: the signed records are then returned to a superior officer of the department, who determines the complaint, and may fine defendant or sentence him to forced labour. The Customs and the Police are administrative and not judicial bodies, but the records of the penal proceedings are certified under official seal, and are conclusive evidence in Russian courts. The Recorder held that the bodies whose seals were attached to the documents

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in question, being administrative, were not courts in the sense of the Evidence Act, 1857.

S. 7 of 14 & 15 Vict. c. 99, one of Lord Brougham's Acts (1851), runs:—"All proclamations, treaties and other acts of State of any foreign State . . . and all judgments, decrees, orders and other judicial proceedings of any Court of Justice in any foreign State . . . and all affidavits, pleadings and other legal documents filed or deposited in any such Court, may be proved in any Court of Justice . . . either by examined copies or by copies authenticated as hereinafter mentioned; . . . if the document sought to be proved be a judgment, decree, order or other judicial proceeding of any foreign . . . Court, or an affidavit, pleading or other legal document filed or deposited in any such Court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign . . . Court to which the original document belongs, or in the event of such Court having no seal, to be signed by the judge . . .; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal . . . or of the signature . . . or of the judicial character of the person appearing to have made such signature. . . ."

Thus "Court" is "a place where justice is judicially administered": Co. Litt. 58a. The three essentials of a Court are *actor, reus, judex:* 3 Bl. Comm. 25. Administrative bodies may be Courts: 4 Inst. 268; Sheppard's Touchstone (ed. 1675) tit. Court, pp. 461—2; and even Courts of record: cf. *Case of the Commissioners of Sewers,* or *D. of Newcastle* v. *Clark,* 8 Taunt. at 617: 1818, though jurisdiction be only to enquire: 4 Inst. *Proem; Dawkins* v. *L. Rokeby,* 4 F. & F. 806; L. R. 8 Q. B. 255; L. R. 7 H. L. 744: 1866—75, military Court of enquiry. Jurisdiction to punish by fine or imprisonment makes a Court of record: *Physicians' Case,* or *Groenvelt* v. *Burwell, &c.,* 1 Ld. Raymond, 454: 1699; *Kemp* v. *Neville,* 10 C. B. 523: 1861. The test is, does a public body by public law determine legal right or *status* in a *lis* between parties *ex debito justitiæ?*

Counsel also referred to *Royal Aquarium* v. *Parkinson,* 1892, 1 Q. B. 431; *Boulter* v. *JJ. of Kent,* 1897, A. C. 556; *Co-*

Partnership Farms v. *Harvey-Smith*, 1918, 2 K. B. 405: approved by C. A. in *Gerhold* v. *Baker*, 35 T. L. R. 102: 1918; *Hill* v. *Clifford, &c.*, 1907, 2 Ch. 236.

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The Court was clear that upon the evidence below the proceedings relied upon by the appellants were not in a "Court of Justice" within s. 7 of the Act of 1851.

Hewart L.C.J.
Avory J.
Salter J.

Appeals dismissed.

Solicitor for Appellants—*W. H. Thompson.*

H. J.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE HORRIDGE AND MR. JUSTICE SALTER.

ERNEST ARTHUR HAILWOOD AND HAILWOOD AND ACKROYD, LTD.

27 *February.*

Expenditure incurred about and during an election in an attempt to defeat or reduce the majority of a parliamentary candidate may require authorisation by the agent although the person making it does not desire actively to promote the return of any other candidate.

Appeals against conviction.

Appellants were convicted at the Central Criminal Court on 9th December, 1927, of offences against s. 34 (1) of 7 & 8 Geo. 5, c. 64, and were each sentenced by Talbot J. to pay a fine of ten pounds and the costs of the prosecution.

The said s. 34 (1) is: "A person other than the election agent of a candidate shall not incur any expenses on account of holding public meetings or issuing advertisements, circulars or publications for the purpose of promoting or procuring the election of any

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Avory J.
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candidate at a parliamentary election, unless he is authorised in writing to do so by such election agent."

(2) "If any person acts in contravention of this section he shall be guilty of a corrupt practice other than personation within the meaning of the Corrupt and Illegal Practices Prevention Act, 1883, and the expression "corrupt practice" shall be construed accordingly."

The short point in this case was whether, there having been three candidates at a recent parliamentary election in the constituency of Brixton, and appellants having incurred expenses and otherwise acted in the sense of the above sub-s., avowedly in order to reduce the majority of one of the said candidates, whom they named (without, as they contended, wishing to promote the return of either of his competitors), they were liable within the words of the statute.

Comyns Carr, K.C. (with him *Frampton*) for the appellants, who were not in custody. The expression "such agent" must mean a specific person: the section is intended to prevent unauthorised electioneering *on behalf of* a specific candidate, whose agent's sanction must be obtained: it is not aimed at action merely *against* a particular candidate. Here it was indifferent to appellants which of the two, to whom they did not refer, "got in."

R. Oliver, K.C., and *C. Willoughby Williams* for the respondent, were not called upon.

AVORY J.: The Act of 1918 was aimed at individuals or bodies incurring expenses to help candidates which would never appear in any agent's official return. The fact that two candidates were in this case—indirectly—helped was immaterial, for by virtue of s. 1 (3) (b) of the Interpretation Act, 52 & 53 Vict. c. 63, the singular was here to be read as the plural—"candidate" as "candidates." Appellants' motives were not in issue: their effect was, at any rate, clear—to promote the success of the other candidates.

The late Sir Hugh Fraser, [J.] in his work on "the Representation of the People Acts, 1918 to 1921" (1922) at p. 221, observes on s. 34: "It may be well to draw attention to the

danger to which members of the public may be exposed if they are ignorant of, or neglect to observe the provisions of, s. 34. Owing to the wide scope of the words "for the purpose of promoting or procuring the election of any candidate," it will be of the utmost importance for any person who intends to hold a public meeting, or to issue literature of a political character, to consider very carefully whether such meeting or literature is directly or indirectly for the "purpose" referred to, and if so, to obtain the requisite authorisation."

Appeals dismissed.

H. J.

Solicitors for Appellants—*Gibson & Weldon* for *A. A. Burton*, Leeds.

Solicitors for the Respondent—*Lewis & Lewis*.

WILFRED FRANCIS REMINGTON McCARTNEY AND GEORGE HANSEN.

Anyone who has seen a person write though only once is a competent witness to identify the latter's handwriting.

Appeals against conviction and applications for leave to appeal against sentence.

Appellants were convicted at the Central Criminal Court, on January 18th, 1928, after three days' trial, of conspiracy, and the former of offences against the Official Secrets Act (1 & 2 Geo. 5, c. 28), and the latter of procuring the commission thereof, and were each sentenced by the Lord Chief Justice to ten years' penal servitude and to two years' imprisonment with hard labour (concurrent).

Serjeant Sullivan, K.C. (with him *St. John Hutchinson*) for McCartney, who was present.

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WILFRED FRANCIS REMINGTON McCARTNEY AND GEORGE HANSEN.

Avory J.
Horridge J.
Salter J.

Melville, K.C. (with him *Keeves*) for Hansen, who was present.

Only one point is reported.

At the trial an inspector of police gave evidence that he knew McCartney's handwriting, because he had seen him write a letter to his solicitor. The contents of this letter he had forwarded to its destination by telephone to save time. Counsel had objected that this was a breach of a client's privilege, because the officer had opened and read the letter without appellant's consent, but it appeared that the message was only one asking the recipient to come and see him, and the officer said that the course taken was in appellant's interest: the letter had been produced in Court by the officer, who had kept it, but had not been shown to the jury.

The Attorney-General (with him *Giveen* and *D. G. Roberts*) for the Crown was stopped, but referred on the point of privilege to *Hurd* v. *Moring*, 1 C. & P. 372: 1824.

Melville, K.C., pointed out that there was no discrimination in the sentences, though his client was not a British subject.

Appeals dismissed.

H. J.

Solicitors for Appellant—*E. O'Connor & Co.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE ROCHE.

SAMUEL HATCH, ARTHUR SIDNEY SMITH AND FRANK SMITH. 1928 *5 March.*

Further evidence is only heard by the Court in exceptional circumstances.

Appeals against conviction and sentence, and applications for leave to call further evidence.

Appellants were convicted at the Norwich Assizes, on January 31st, 1928, of poaching and being armed at night, and were sentenced by Salter, J., to eight months' imprisonment with hard labour.

W. B. Manley for the appellants (under s. 10 of the Criminal Appeal Act, 1907), who were present, asked and obtained leave to confer with them.

The further evidence it is desired to call is that of three men who, since the trial, have made a joint affidavit confessing this crime. No notice has been given of this application, but appellants have just requested that it should be made. The men have been ordered to be here: they were in Court the first day of the Assizes, but they could not be found the next day.

The application of which notice has been given is to call the wives of the appellants. They were in the Court below, and I offered them to be Crown witnesses for cross-examination.

Cope Morgan for the Crown was not called upon.

The Court reiterated that only in exceptional circumstances would it permit persons available at the trial to be called as witnesses on appeal.

Applications and appeals dismissed.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER AND MR. JUSTICE ROCHE.

1928
12 *March.*

RICHARD BOREHAM BOREHAM.

Sentence mitigated in view of youth.

Appeal against sentence by leave of the Court.

Appellant was convicted at the Essex Sessions, on February 15th, 1928, of obtaining ten shillings by false pretences, and was sentenced to twenty-one months' imprisonment with hard labour.

Appellant in person.

The Court, having regard to the smallness of the sum obtained, and especially to the appellant's youth (he being twenty-two), reduced the term to twelve months, but in view of his many previous convictions warned him that this was the last occasion on which leniency would be exercised in his favour.

Sentence reduced.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE TALBOT.

SIDNEY ABRAHAMS AND SAMUEL GERSTEIN.

1928
26 *March.*

There ought to be a finding upon every count in an indictment.

Applications for leave to appeal against conviction and sentence.

Applicants were convicted at the Kingston-upon-Hull City Sessions, on February 9th, 1928, after a two days' trial, of conspiracy to defraud and of cheating at cards, and were sentenced by the Deputy-Recorder to six months' and twelve months' imprisonment with hard labour respectively.

Paley Scott for the applicants.

The Court, in dismissing the applications, again insisted on the necessity of the verdict being found on every count of an indictment: in this case there were eight counts.

Owing to the shorthand transcript having been delivered piecemeal, there had been delay in the hearing, and sentence would therefore run from March 12th.

Applications dismissed.

H. J.

Solicitor for Applicants—*Basil K. Barton.*

1928
26 *March.*

Hewart L.C.J.
Avory J.
Talbot J.

ANDREW ROSS.

Mitigation of sentence in view of good character.

Appeal against sentence by leave.

Appellant was convicted at York Assizes, on February 29th, of carnal knowledge of a mental defective, and was sentenced by Branson J. to fifteen months' imprisonment with hard labour.

His defence was that he had no reason to know originally that the woman (with whom he lived) had been an inmate of a home for female defectives, whence she had been discharged on licence. It appeared, however, that the police had warned him when they found her, and took her back to the home. She escaped thence and rejoined him voluntarily.

The Court thought that the gravity of the offence lay in the disregard of the warning of the police, but as possibly he may have thought that she was not so seriously affected as had been suggested, and in view of his very excellent character in the Royal Naval Reserve, and as a seaman generally, and as he was only about thirty years old, the term was reduced to nine months from the date of conviction.

Sentence reduced.

H. J.

The Court (the Lord Chief Justice, and Avory and Acton JJ.) sat on April 2nd to hear applications.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE FINLAY.

WILLIAM GREGORY. 1928 4 *April.*

The Court only grants bail exceptionally.

Application for bail.

Applicant was convicted at Nottingham Assizes, on March 6th, 1928, of indecent assault, and was sentenced by Hawke J. to six months' imprisonment in the second division. He had been granted leave to appeal against conviction on April 2nd.

By the Court: Bail is allowed in appellant's own recognisance of £25: he has been in custody some weeks. There are special and peculiar circumstances in this case, and it is not to be regarded as a precedent.

Application granted.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER AND MR. JUSTICE TALBOT.

The LORD CHIEF JUSTICE: Since the last sitting of this Court a situation has arisen, affecting the jurisdiction of the Court, which calls for some comment. 28 *April.*

By the Criminal Appeal Act, 1907, this Court is constituted the final Court of Appeal in criminal cases, subject only to an appeal to the House of Lords on the certificate of the Attorney-

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23 *April.*

Hewart
L.C.J.

General. On March 22nd, 1926, this Court affirmed the conviction of one *Denyer*,* who had been convicted by a jury of the offence of demanding money by menaces, contrary to s. 29 of the Larceny Act, 1916.

At the end of last sittings judgment was given in Appeal Court II. in a case of *Hardie and Lane, Ltd.* v. *Chilton and Others*,† in which a claim had been made to recover money alleged to have been paid under duress, in circumstances similar to those in *Rex* v. *Denyer*.

The Lord Justice‡ who delivered the leading judgment in the Court of Appeal is reported to have said, in the course of it, that in his opinion the case of *Rex* v. *Denyer* was wrongly decided. It may be well, therefore, to make it clear, for the purposes of the administration of criminal law, that unless and until the decision in *Rex* v. *Denyer* in this Court is reversed by the only competent tribunal, it is binding upon and will be enforced by this Court against any person or persons offending in like manner.

ALFRED TAFF RUTT.

The Crown is entitled to proceed with an allegation (in legal form) that prisoner is a habitual criminal, at its pleasure.

Application for leave to appeal against conviction.

Applicant (who was not present) was convicted at Lewes Assizes, on March 9th, 1928, of obtaining money by false pretences, and was sentenced by Shearman J. to five years' penal servitude. There was also an allegation that applicant was a habitual criminal.

The Lord Chief Justice, in giving judgment dismissing the application, stated that the learned judge had stopped the prosecution from proceeding with that allegation; in the opinion of

* 1926, 2 K. B. 258; 95 L. J. K. B. 699; 134 L. T. 637; 28 Cox C. C. 153; 42 T. L. R. 452; 19 Cr. App. R. 93.

† 1928, W. N. 96; 44 T. L. R. at p. 474.

‡ Scrutton, L.J.

the Court, as it had recently said [20 Criminal Appeal Reports, 1], when such a charge is in order and the prosecution desires to pursue it, the better course is to allow it to proceed, and not, after all the proper machinery had been put in motion, to bring the matter to a premature end; the learned judge is not, of course, bound to impose preventive detention in the event of a conviction.

1928
23 *April.*

Alfred Taff Rutt.

Howart L.C.J.

Application dismissed.

H. J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SHEARMAN.

ALBERT FRANCIS MARTIN.

30 *April.*

Sentence increased.

Appeal against sentence by leave of the Court (April 23rd).

Appellant, who was present, was convicted on March 8th, 1928, at the Nottingham Assizes, of arson of his own house while his family were in it, and was sentenced by Hawke J. to three years' penal servitude.

Appellant, in person, admitted that he had been warned that if he persisted in his appeal the term of his sentence might be increased: he pleaded his previous good character.

The LORD CHIEF JUSTICE (after reciting the facts of the case, whence it appeared that appellant's wife and children were in danger of their lives) stated that the Court increased the term to five years.

Sentence increased.

H. J.

1928
7 *May.*

Hewart L.C.J.
Avory J.
Shearman J.

WILFRED DU PARCQ BENNETT.

Charges of sufficient gravity should not be reduced merely to found the jurisdiction of Petty or Quarter Sessions, but should be committed to Assizes.

Application for leave to appeal against sentence.

Applicant pleaded guilty at the Portsmouth City Sessions, on April 17th, 1928, to inflicting grievous bodily harm (one count in an indictment) upon his stepmother, and was sentenced by the Recorder to five years' penal servitude.

AVORY J., in dismissing the application, remarked that a practice, to be deprecated, was springing up, viz., that of reducing charges so that, under the recent Act [Criminal Justice Act, 1925] they might be dealt with summarily or at Quarter Sessions, instead of being sent to Assizes (where the appropriate sentences could be inflicted). That Act was not intended as an invitation to the inferior Courts to reduce charges in order to found jurisdiction. Here the facts of the case (which the learned judge recited) justified a much more severe sentence on the charges which were not preferred, viz., assaulting with intent to murder, or wounding with intent to do grievous bodily harm—a sentence which could have been imposed at Assizes, whereas that which Quarter Sessions had imposed, though it was the maximum, was for the lesser offence.

Application dismissed.

H. J.

CHARLES FREDERICK WEEKS.

Observations by the Court on the drawing of indictments for obtaining by false pretences.

An improper question to a prisoner (especially one undefended) may invalidate a conviction.

Appeal against conviction and sentence.

Appellant was convicted on April 3rd, 1928, at the Hampshire Sessions, of obtaining four pounds seven shillings by false pretences, and was sentenced by the learned Chairman to six months' imprisonment with hard labour.

1928
7 *May.*

CHARLES FREDERICK WEEKS.

Hewart L.C.J.
Avory J.
Shearman J.

Blake Odgers for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was unrepresented below: there were six counts in one indictment all dealing with one single transaction: one count would have been sufficient.

[THE LORD CHIEF JUSTICE: The jury might well think that there was a series of charges.]

All the counts were left to the jury.

[THE LORD CHIEF JUSTICE: There is no mention in the summing-up of an intent to defraud. And who asked defendant "To keep an unused cheque on you was a valuable asset to a man of your character, was it not?"]

Graham Dickson for the Crown. I did.

[THE LORD CHIEF JUSTICE: Is not that enough?]

Dickson. Though the words "intent to defraud" do not appear in the Chairman's charge, the sense is clearly there.

The question I put ought to have been couched more generally.

THE LORD CHIEF JUSTICE (*a*): Charles Frederick Weeks was convicted at the Hampshire Quarter Sessions for obtaining money by false pretences, and was sentenced to six months' imprisonment with hard labour, and he now appeals against both conviction and sentence. The indictment was a queer document which contained six counts, and should only have contained two, or at most three; they are all counts relating to one transaction. The charge was in substance that the appellant fraudulently converted two £1 notes, four 10*s.* notes, and a postal order for 7*s.* entrusted to him by one Harman to pay to one William Bissett. The appellant was charged with conversion in that way, but he was also charged in four different counts with obtaining those notes by four different sorts of false pretences, and finally he was charged with larceny. At the commencement of the proceedings the Chairman expressed the view that the real charge was one of obtaining money by means of a worthless cheque, and learned counsel for the prosecution accepted that view, but nevertheless the whole indictment seems to have gone to the jury, and the jury at the

(*a*) This judgment is printed from a shorthand transcript supplied by the courtesy of the Director of Public Prosecutions.

1928
7 *May.*

CHARLES FREDERICK WEEKS.

Hewart L.C.J.

conclusion of the matter said that they found the prisoner guilty. The words are: "Are you all agreed upon your verdict?" The foreman says: "We are"; then: "Do you find the prisoner guilty or not guilty," and the answer is: "Guilty." The indictment was marked "Guilty of misdemeanour," and if one assumes charitably that it was made plain to the jury that the question was whether the appellant had obtained money by false pretences, it is quite clear that as the defence of the appellant was not that he had not obtained the money, but that there was no intent to defraud, it ought to have been made clear in the summing-up that an essential ingredient of the defence was an intention to defraud. That proposition has been laid down again and again by this Court; I need only refer to the case of *Andrew Baker*, 17 Cr. App. R. 191 (*a*), where in the judgment of the Court it is said: "Inadvertently the Deputy-Chairman omitted to explain to the jury that in a charge of obtaining by false pretences an essential ingredient of the offence is that that which was done was done with intent to defraud. It is always necessary that this fundamental point should be made plain to the jury, and especially so when the accused says not that he did not do the acts, but that he did them with no intent to defraud." These observations apply to the present case and are sufficient to dispose of it.

But there is another and quite separate matter which is also sufficient to dispose of it. It appears by question 89 that in the cross-examination of this undefended defendant this question was asked: "I put it to you that an unused cheque was kept by you, because it is a valuable asset to a man of your character." We are told that what was intended to be said was not "a valuable asset to a man of your character," but "a valuable asset to a man of your type"; it is a distinction without a difference. The question in the form in which it was put, or in the form in which it is suggested it should have been put, was well calculated to make some member of the jury, at any rate, think that they were trying a man of a questionable character.

It is impossible to sustain this conviction; the appeal is allowed and the conviction quashed.

Conviction quashed.

H. J.

(*a*) 1923: c. q.

ARTHUR OWEN NOBLE.

1928
7 *May.*

Hewart L.C.J.
Avory J.
Shearman J.

When there is reasonable doubt on the facts, defendant is entitled to the jury's consideration of his proved good character.

Appeal against conviction.

Appellant was convicted on April 10th, 1928, at the Anglesey Sessions (after a disagreement at a previous trial) of larceny, and was sentenced by the Chairman to six months' imprisonment with hard labour: the jury recommended leniency. He was defended by a solicitor

Bertram Reece for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant put his character in issue, but the Chairman categorically told the jury that this consideration was immaterial and not for them.

[The LORD CHIEF JUSTICE: He disagreed with Tindal C.J. (and Parke, B. and Williams, J.), who in *Frost*, 4 State Trials, N. S. 85: 1889, said: "If the scales are hanging even and you feel a doubt whether the party is guilty or not of the act charged against him, then undoubtedly you will give him the full benefit of such testimony of general character which he may have earned by his previous conduct in life, &c."—cited in *Broadhurst and Others*, 13 Cr. App. R. at 129: 1918.]

Trevor Lloyd for the Crown. The defence of mistaken identity was a mere "red herring": the proviso to s. 4 of the Criminal Appeal Act should be applied in this case. It is true that he had had fifteen years' employment with the same opportunities of temptation.

The LORD CHIEF JUSTICE: There was misdirection. The proviso to s. 4 can only be applied when, whatever the direction was, the jury *must* have come to the same conclusion. Moreover, one jury had disagreed.

Conviction quashed.

H. J.

1928
14 *May.*

Hewart L.C.J.
Avory J.
Shearman J.

DOUGLAS SEATON AND PATRICK FLANAGAN.

Severity of sentence.

Appeals against sentence by leave of the Court.

Appellants were convicted on March 9th, 1928, at the Manchester Assizes, of knowingly receiving stolen property, and were sentenced by Wright J. to twenty-one months' imprisonment with hard labour.

Goldie, K.C. (with him *Batt*), for Seaton, who was present.

Elliot Gorst for Flanagan, who was present.

Counsel urged the previous good character of the appellants (there being nothing recorded except a single conviction for which Flanagan was fined in 1914).

Hawke, for the Crown, was not instructed to oppose the appeal.

The Court, treating the appellants as first offenders, but warning them that this was absolutely the last occasion for leniency, reduced the terms to twelve months.

Sentences reduced.

H. J.

Solicitors for Appellants—*J. A. Behn* and *R. B. Stephenson,* Liverpool.

HORACE GUY SMEE.

Sentence to detention in a Borstal Institution set aside.

Appeal against sentence by leave.

Appellant, who was nineteen years old, pleaded guilty on April 11th, 1928, at the Essex Sessions, to housebreaking and shopbreaking and stealing small sums of money, and was sentenced to three years' detention in a Borstal institution. There was no previous conviction.

1928
14 *May.*

HORACE GUY SMEE.

Hewart L.C.J.
Avory J.
Shearman J.

A Probation Officer informed the Court that appellants' family was highly respectable, but that owing to illness he had not been kept under discipline: he had a definite prospect of finding him work, and meanwhile a brother would take charge of him: the latter was heard by the Court.

The Court, in view of these facts, and especially of the prospect of immediate work, varied the sentence to his entering into his own recognisance for £5 on the usual conditions, and on that of obeying the instructions of the Probation Officer.

Sentence varied and reduced.

H. J.

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